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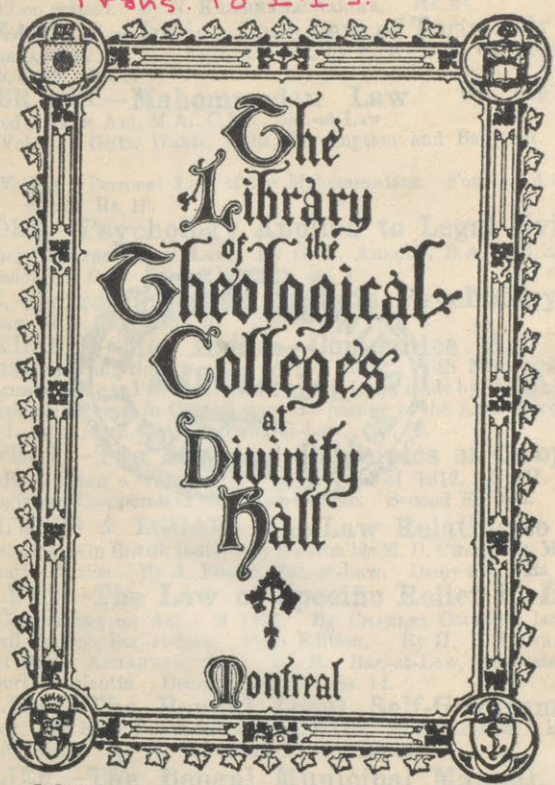
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BARRISTER-AT-LAW

FORMERLY READER IN INDIAN LAW TO THE UNIVERSITY OF CAMBRIDGE, AUTHOR OF "AN INTRODUCTION TO THE STUDY OF ANGLO-MUHAMMADAN LAW," ETC.

FIFTH EDITION

REVISED AND BROUGHT UP-TO-DATE

BY

A. YUSUF ALI, C.B.E., M.A., LL.M. (Cantab.), F.R.S.L.

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PREFACE TO THE FIFTH EDITION.

THE last edition of Sir Roland Wilson's Anglo-Muhammadan Law was published in 1912. Since then a good deal of material has accrued to the student of Anglo-Muhammadan Law, in the shape of cases, text-books, and on the important point, legislation. I have done my best to incorporate all the latest material, and bring this justly esteemed work thoroughly up-to-date. I have had the honour of enjoying Sir Roland's friendship and profiting by his influence since my Cambridge days, and he has, with his usual kindness and courtesy, ungrudgingly helped me with his advice and assistance in preparing the present edition.

In a work so much used in India and so frequently quoted in the Courts, any changes in the numbering of the sections are undesirable, and I have avoided them as far as possible. In conformity with the practice followed in previous editions, new sections have been introduced where necessary, without affecting the numbering of the old sections. For example, the legislative amendment to the law of *Wakf* has been inserted as sec. 323B of the Digest, and the necessary amendment has been made in sec. 323, while the numbering of sec. 324 and the following sections remains unaltered. In the matter of views and opinions I have generally found myself in agreement with Sir Roland Wilson. In the few cases where I am alone responsible for the views stated, my responsibility has been sufficiently indicated, and reasons have been given in support. For example, see sec. 62 and note thereon; the latter end of the note to sec. 38; and the whole of Chapter XV.

As regards case-law, more than a hundred new cases have been cited, and the latest rulings to hand, to the date of the manuscript being handed in to the Publisher, have been

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incorporated. I have made a rather freer use than before of the Punjab Rulings, as the *Punjab Record* is now easily accessible. With the establishment of the new High Court in the Punjab, the state of law reporting in that Province will no doubt receive more attention. The Bihar High Court was also established since the last edition was published, and I have used all the relevant Patna cases reported.

Among the more notable new books used in the present edition, may be mentioned: (1) Nawab Abdur Rahman's *Institutes of Mussulman Law*, which makes available in English, Kadri Pacha's Code, officially recognised for the mixed Tribunals in Egypt; the appendix containing the Arabic text will be welcomed by students; (2) Mr. F. B. Tyabji's *Principles of Muhammadan Law*, particularly full in the citation of case-law; (3) the Fourth Edition of Syed Ameer Ali's valuable *Mahommedan Law*, Vol. I, 1912, and Vol. II, 1917, whose comprehensive juristic grasp it would be impertinent of me to enlarge upon; (4) Mr. N. P. Aghnides's work on the theoretical side of *Muslim* jurisprudence, published by the Columbia University and containing copious references to the original authorities; and (5) Mr. F. H. Ruxton's *Maliki Law*, which must now be considered the best authority on that subject in English.

As regards legislation, the Mussulman *Wakf* Validating Act, 1913, settled the controversy about family settlements, as regards *wakfs* created since the passing of that Act. I have inserted the text of this short Act in full in Appendix B, and appended a short commentary, besides incorporating the new legislation in its appropriate place in the Digest. It has been ruled that the Act is not retrospective and indeed its wording left no doubt on the subject, though the non-official Muhammadan members appear to have hoped, in the discussions in Council, that the Act, being declaratory, would be applied retrospectively. It was one of the few private members' Act passed by the Morley-Minto Councils. It is not quite clear whether its drafting will not raise fresh difficulties in the law of *wakf*, but at any rate a tendency, more favourable to family *wakfs* is already noticeable in the latest post-Act decisions on the pre-Act law: see P. C.

decision in *Mutu Ramanadan Chettiar* (1916), L. R., 44 Ind. App.,21.

It cannot be said that the deviations from Muhammadan Law permitted to Khojas and Memons are even yet precisely defined, but further remarks on the subject, and references to the new cases, will be found in the Historical and Descriptive Introduction.

It is hoped that this edition will continue the useful work of its predecessors and afford a handy and tolerably full statement of Anglo-Muhammadan Law as enforced in Indian Courts at the present day.

A. YUSUF ALI.

Post script.—While this edition was passing through the press, I have to record the death of Sir Roland Wilson in October 1919, and to pay my affectionate tribute of appreciation to his memory. Sir Roland realised in his person the virtues of old age as sketched by Cicero. To the last year of his life, he retained the mental vigour and the freshness of outlook which gave him a commending position without creating a distance between him and the world around him. Not many weeks before his death, he discussed with me a new ruling on Anglo-Muhammadan Law in its bearing on the social development of the Muslims. His sympathies were as wide as his faculties were acute. While holding strong views, he was always open to conviction. To have known him for 28 years, to have conversed with him in intimate talk on public and private questions in the changing kaleidoscope of the world, to have won his confidence and to have been associated with him in links of mutual respect and affection; these experiences are among the most cherished treasures of my life. ***May his soul rest in peace.***

A. YUSUF ALI.

BOMBAY,
1*st December*, 1920.

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LIST OF LAW REPORTS—WITH ABBREVIATIONS

Bengal.

Reports of cases determined in the Court of Sudder Dewanny Adawlut, by W. H. Macnaghten. Select cases from 1791 to 1848, 7 vols	S.D.A. (with number of *volume*).
Sudder Dewanny Adawlut (Bengal), 1845-1861 . .	S.D.A. (distinguished by the *year*).
Fulton's Reports, 1842-1844, 1 vol. (Supreme Court) . . .	Fulton.
Hay's Reports, 1862-1863. Several parts bound-up in one volume	Hay.
Marshall's Reports, 1862-1863, 1 vol.	Marshall.
Sutherland's Weekly Reporter, 1864-1876, 25 vols. . . (Unless otherwise specified the reference is to the Civil Rulings ; Cr. denotes Criminal Rulings ; Mis., Miscellaneous Rulings ; F.B., Full Bench Rulings.)	S.W.R.
Ditto, Special Number, Full Bench Rulings, 1862-1864 . .	W.R. 1864
Bengal Law Reports, 1868 to 1875, 15 vols. . . . (In the first four volumes, parts separately paged are devoted to Privy Council (P.C.) ; Full Bench Rulings. (F.B.) ; Appellate Civil (A.C.) ; Original Civil (O.C) cases.)	B.L.R.
Ditto, Supplemental Volume, Full Bench Rulings, 1863-1868	B.L.R. Sup. Vol.
Calcutta Law Reports, 1877-1884, 13 vols.	C.L.R.
Indian Law Reports, Calutta Series, 1875-1917, 44 vols. . . .	Cal.
Calcutta Weekly Notes	C.W.N.

Madras.

Reports of the Madras High Court, 1862-1875, 8 vols. . . .	Mad. H.C.
Indian Law Reports, Madras Series, 1876-1918, 41 vols. . . .	Mad.

Bombay.

Cases illustrative of Oriental life, and of the application of English Law to India, decided in H. M. Supreme Court in Bombay, by Sir Erskine Perry, C.J., 1853, 1 vol. .	Perry's Oriental Cases.
Reports of the Bombay High Court, 1863-1875, 12 vol. . .	Bom. H.C.
ndian Law Reports, Bombay Series, 1875-1917, 41 vols. . . .	Bom.

NORTH-WEST PROVINCES (NOW AGRA).

Sudder Reports of the North-West Provinces, 1846-1851, 6 vols.	N.W.P. (S.D.A.).
Agra High Court Reports, 1866-1868, 4 vols.	Agra.
Ditto, Full Bench Rulings, 1866-1867, 1 vol.	Agra F.B.
Reports of cases heard and determined in the High Court, North-West Provinces, 1869-1875, 7 vols. (Allahabad)	N.W.
Indian Law Reports, Allahabad Series, 1876-1918, 40 vols.	All.
Allahabad Law Journal	A.L.J.

PANJAB

Panjab Record, 1866-1915	Panj. Rec.

BIHAR.

Patna Law Journal, vols. 1-2 (1915-1916)	Patna L.J.

ENGLISH.

Moore's Indian Appeals, decided by the Judicial Committee of the Privy Council, 1836-1872, 14 vols.	Moo. I.A.
Law Reports, Indian Appeals, 1873-1918, Privy Council	L.R., Ind. Ap.
Law Reports, Appeal Cases	L.R., [1895], A.C.
Law Reports, Equity Cases	L.R., Eq.
Law Reports, Chancery Division	L.R., Ch. D.
Law Reports, Queen's Bench Division	L.R., Q.B.
Law Reports, King's Bench Division	L.R., K.B.D.
Law Reports, Probate and Divorce	L.R., P. & D.
Law Reports, Probate Division fr. 1873	L.R., 1 P.D.
Law Reports, (ditto), fr. 1892	L.R. [1892], P.
Haggard's Consistory Reports	Haggard, Consist.
Law Journal, Probate Court	L.J., Pro.

STRAITS SETTLEMENTS.

Kyshe's Reports, 1808-1884, Civil Cases	Kyshe's Rep.

OTHER ABBREVIATIONS

h.h.s.—how high soever.
h.l.s.—how low soever.
s.c.—same case (in another set of Reports).

LIST OF WORKS REFERRED TO, OTHER THAN LAW REPORTS.

NOT a list of authorities consulted, still less a complete bibliography of the subject. It includes translations of Arabic text-books, but not the various untranslated Arabic works referred to at second hand. Particulars respecting these will generally be found, either in the Introduction to Morley's Digest, or in the Tagore Lectures, 1873-4, or in the Introduction to Vol. I of Ameer Ali's Mahommedan Law, or in Abdur Rahim's Muhammadan Jurisprudence (1911), Chapters II to V; or, at pp. 157-196 of N. P. Aghnides, Mohammedan Theories of Finance, with an Introduction to Mohammedan Law, and a Bibliography, New York, 1916.

Numerals enclosed in brackets indicate the page of this work at which the reference occurs. They are not given for works frequently referred to, but instead thereof the abbreviation used, if any, is shown within brackets.

Where no place of publication is specified, it may be taken to be London.

Abraham (Israel), Jewish Life in the Middle Ages. 1896. [198.]

Abdur Rahim, Mr. Justice, The Principles of Muhammadan Jurisprudence, 1911; Madras. [Muh. Jur.]

Abdur Rahman (Nawab A. F. M.), Institutes of Mussalman Law, Calcutta, 1907; based mainly on a translation (not in all cases full, *e.g.* cf. art. 466 of Nawab Abdur Rahman with art. 531 of *Droit Musulman*) from Kadri Pacha's code in French, "*Droit Musulman*," officially recognised by the mixed Tribunals in Egypt. The Arabic text is given in an Appendix. The notes give copious references to Indian case-law and to recognised Arabic text-books on Muhammadan Law, printed in India and Egypt.

Aghnides, N. P., Mohammedan Theories of Finance, with an Introduction to Mohammedan Law and a Bibliography, New York, 1916. [17, 21, 24, 89, 292.]

Ain-i-Akbari, by Abul Fazl Allami (constituting the concluding portion of his "Akbarnamah"); tr. Blochmann, vol. i, 1873; vols. ii and iii, Jarrett, 1891 and 1894. Calcutta. In vol. 61 of the Bibliotheca Indica. [13.]

Ameer Ali [Syed], Mahommedan Law, compiled from authorities in the original Arabic, 2 vols. Calcutta, 1892-4. [M.L.] The references to this edition have been retained, except where otherwise stated. But the latest editions have also been consulted, *viz.*; vol. I, Gifts, Wakfs, &c. 1912; and vol. II, succession and status, 1917.

——, Students' Handbook of Mahommedan Law; 6th edition. Calcutta, 1912. [341.]

——, The Spirit of Islam; or, Life and Teaching of Mohammed. 1891. [91, 318.]

——, Short History of the Saracens. 1899. [63.]

Amos, Sheldon: History and Principles of the Civil Law of Rome, London, 1883. [24.]

Anson (Sir W. R.), Principles of the English Law of Contract, Oxford. 1884. [102].

Arnold, T. W., Prof.: Al-Mu'tazilah, Arabic Text, Leipzig, 1902. [467.]

Asiatic (or *Imperial and Asiatic*) *Quarterly Review*, Woking: 1898, "Should the personal laws of India be codified?" Sir R. K. Wilson [84] 1899, "The Emancipation of Egyptian Women," by Kassem Amin Bey. [466.]

Baillie (Neil B. E.), A Digest of Moohummudan Law—chiefly translations from the Fatawa Alamgiri. The references in the text, unless the contrary is expressly indicated, are to the first edition, 1865, the paging of which, however, differs only slightly from that of the second, 1875. The chief new feature of the second edition is a supplement on the Law of Sale, intended to supersede the author's separate treatise on that subject. [Baillie.]

——, Part II, containing the doctrines of the Imameea (Shia) Code—chiefly translations from the Sharaya ul Islam; second edition, 1887. [Baillie, II.]

——, The Moohummudan Law of Inheritance, according to Aboo Huneefa and his followers; first edition, 1832; second edition, 1874. [47.]

——, The Moohummudan Law of Sale, according to the Huneefeea Code, from the Futawa Aulumgeeree. 1850. See above. [43.]

Bentham (Jeremy), Theory of Legislation, translated from the French of E. Dumont by R. Hildreth, 1874.

Blochmann (H.). See Ain-i-Akbari.

Boulnois (C.) and Rattigan (Sir W. H.), Notes on the Customary Law as administered in the Courts of the Punjab; second edition. 1578. [81.]

Browne (E. G.), A Literary History of Persia, 1903. [12.]

Cadoz, F. Droit Musulman Malekite; "examencritique de la traduction de M. Perron. Bar-sur-Aube, 1870. [14.]

Cherbonneau (E.), et Sautayra (E.), Droit Musulman: du Statut personnel et des Successions. Paris, 1873. [484.]

Clavel (Eugène), Droit Musulman, du Statut personnel et des Successions, d'apr les differents rites et plus particulièrement d'apres le rite Hanafite; 2 vols. Paris 1895. The second volume includes the Code published in 1875 by the Egyptian Government, for the guidance of the tribunals of that country. [Clavel, D.M.]

——, Droit Musulman, le Wakf ou Habous, d'apres la doctrine et la jurisprudence (Rites Hanafite et Malékite), Cairo 1896. [Clavel, Wakf ou Habous.]

——, Revne Internationale de Legislation et de Jurisprudence Musulmanes, Caire 1895-6, an interesting collection of European-Muhammadan case law, as interpreted in the Courts of North Africa. [Clavel, Revne.] [81.]

Dart (J. H.), The Law and Practice relating to Vendors and Purchasers of Real Estate; sixth edition, 1888. [256.]

D'Ohsson (Mouradjea), Tableau Général de l'Emprie Ottomane. Paris, 1787–1820 [Tableau Général.]

Encyclopædia Britannica, eleventh edition, Vol. xvii. [467].

Erskine (John), Principles of the Law of Scotland; fourteenth edition, 1870. The last edition is the twentieth, 1903. [267.]

Fatawa Alamgiri. See Baillie.

Field (C. D.), Law of Evidence in British India, fourth edition; Calcutta, 1884. [161.]

Finlay (Geo.), History of Greece, B.C. 146 to A.D. 1864. 7 vols., 1887. [23,]

Goldziher, Influence of Parsi-ism on Islam, printed in C. P. Tiele's Religion of the Iranian People, translated by G. K. Nariman, Bombay, 1912. [24.]

Halhed (N. B.), The Gentoo Laws, translated from the Persian. London, 1776. [33.]

Hamilton (C.), The Hedaya, or Guide; a Commentary on the Mussulman Laws, translated from a Persian rendering of the original Arabic; second edition by S. G. Grady. London, 1870. The original edition, in four quarto volumes (1791) is frequently referred to in the Indian Law Reports. [Hed.]

Hastings, James: Encyclopædia of Religion and Ethics—London, 1908, etc.

T.P. Hughes: Dictionary of Islam, London, 1885; Hurgronje, C. Snouk, Mohamedanism, Lectures on its origin, its religious and political growth, and its present state. New York, 1916.

Jenks, (E.) Law and Politics in the Middle Ages. 1878. [267.]

Jones (Sir Wm.), Al Sirajiyyah; or, The Mohammedan Law of Inheritance—with commentary taken mainly from the Sharifyah. Calcutta, 1792. [43, 269.]

Justinian, Digest and Institutes. Dig., Inst.

Kassem Amin Bey, The Emancipation of Egyptian Women. See *Asiatic Quarterly Review.*

Kremer (A. Von), Culturgeschichte d s Orients unter den Chalifen, 2 vols. Wien 1875. [24, 198.]

Luciani (J. D.), Successions Musulmanes. Paris, 1890. [263, 407, 414.]

Macnaghten, (Sir W. H.), Principles and Precedents of Moohummudan Law. Calcutta, 1825. [Macn., Prec.]

This is the edition generally referred to.

——, ———, fourth edition, by W. Sloane, with Appendix containing, besides other new matter, a Digest of illustrative cases judicially decided, extending from 1793 to 1859. [Macn. Dig.]

Mahomed Yusoof Khan Bahadur (Moulvi), Mahomedan Law relating to Marriage and Divorce, etc., Tagore Lectures, 1891-2; 3 vols. Calcutta, 1895. [M.Y.]

Maine (Sir H.), Ancient Law; second edition. London, 1863. [46.]

Matthews (A. N.), Mishcat ul Masabih, translated from the Arabic; 2 vols. Calcutta 1809. [Mishcat.]

Mayne (J. D.), Hindu Law and Usage; sixth edition. 1900. [148.]

Meer Hassan Ali (Mrs.), Observations among the Mussulmauns of India. 2 vols. 1832. Catalogued in British Museum as Mír Hasan Ali (B). [428.]

Mishkat ul Masábíh, by Abu Abdullah Muhammad al Khatíb-ut-Tabrízi; A Shafei work of the 8th Century of the Hijra, much used in India. Translated by A. N. Matthews.

Morley (W. H.), Analytical Digest of Cases decided in the Supreme Court of Judicature in India in the Court of the Hon. East India Company, and on appeal from India by H. M. in Council, with Introduction, Notes and Appendix., 2 vol. 1849. Ditto, New Series, vol. i to end of 1850, 1852. [Morl. Dig.]

Muir (Sir Wm., K.C.S.I.), Life of Mahomet; third edition, 1894.

——, The Caliphate, its rise, decline and fall; second edition, 1892. [Early Caliphate.]

Mulla (D. F.), Principles of Mahomedan Law; fifth edition, Bombay, 1915. [161, 343.]

Nauphal (or "Néval," Prof. J. de), Cours de droit Musulman, La Propriété., St. Petersburg, 1886. [484.]

————, Système Législatif Musulman, Marriage. *Ib.* 1893. [198.]

————, Législation Musulmane, Filiation et Divorce, 1893.

Osborn (Col. R. D.), Khalifs of Baghdad. 1878. [17, 466.]

Palmer (E. H.), The Quran (Koran), translation and commentary; vols. vi and ix of "Sacred Books of the East." Oxford, 1880.

Perron (Nicolas), Précis de Jurisprudence Musulmane. 6 vols., 1844, etc. [128, 484.]

Pollock (Sir F.) and Maitland (F. W.), History of English Law, before the time of Edward I.; 2 vols.; second edition, 1898. [7.]

Querry (A.), Droit Musulman, Recue l' des Lois concernant les Musulmans Schytes; 2 vols. Paris, 1871.

This is simply a translation, with notes of the Sharaya-ul-Islam. Querry

Rattigan (Sir W. H.), Digest of Customary Law ; a digest of civil law for the Punjab chiefly based on the customary law as at present judicially ascertained. London and Lahore, 1901 [81.]

Robertson (Sir Frederick), Article on the relations between the English law and the personal law of Indians in England, with special reference to the Marriage Law Journal of Comparative Legislation and International Law, vol. xviii, part 2.

Rumsey (Almaric), Moohummudan Law of Inheritance (enlarged from the author's Chart of Family Inheritance (1866-1880). [47.]

——, Al Sirájiyyah ; or The Mahommedan Law of Inheritance, reprinted from the translation of Sir Wm. Jones (see above, with notes and Appendix ; second edition, 1890. [Sr,]

Russell, A. D. and Abdullah al-Mamun Suhrawardy : First steps in Muslim Jurisprudence, being Arabic extracts from Ibn Abu Zaid's Compendium of Maliki Law, with English translation, notes, and Introduction. Used as a text-book in West Africa. [13 .]

Ruxton, F. H. : Maliki Law. London, 1916. [14, 423.]

Sale (Geo.), The Koran, with notes and preliminary discourse ; edition of 1892. [Koran.]

Samee-Ullah Khan Bahadur (Moulvi), A judgment containing an exposition of the Muhammadan Matrimonial Law. Allahabad, 1891. [121].

Sanchez, De Sancto Matrimonii Sacramento. Antwerp, 1614 ; Lyons, 1654. [24.]

Seignette (N.), Code Musulman, par Khalil, texte Arabe et nouvelle traduction. Constantine, 1878. [128.]

Sharaya ul Islam. (See Querry.)

Shibli No'mani : Life of Abu Hanifa (*Sirat-un-No'man*) in Urdu. Agra, 1892. [9, 24.]

Sircar (Shama Churun), Tagore Lectures, 1873-1874 ; Calcutta, 1873-1875.

Smith (W. Robertson), Kinship and Marriage in Early Arabia. Cambridge, 1885. [70, 147, 290.]

Steiver, H. : Die Mu'taziliten-Leipzig, 1865. [467.]

Stokes (Whitley, LL.D.), The Anglo-Indian Codes. Oxford, 1887, with two supplements, 1889-1891. [84.]

Tacitus (C. Cornelius), Germania. [54.]

Taylor (Alfred Swayne, M.D.), Principles and Practice of Medical Jurisprudence; 2 vols. ; fifth edition, 1905. [160.]

Tirmizi : Jami,' (Arabic and Urdu), Lucknow Edition, Nawal Kishor Press, in 2 vols. with commentary, by Fazl Ahmed Dilawari. [52, 56, 94.]

Tornauw (N. Von), Moslemische Recht. Leipzig, 1855. [148.]

Townsend, (Meredth), Asia and Europe. 1901. [5.]

Trevelyan (Sir E. J., L.D.C.), Hindu Family Law ; London, 1908. [190.]

Tyabji (Faiz Badruddin), Principles of Muhammadan Law. Bombay, 1913. [sec. 60, notes.]

Van Den Berg (L. W. C.), Manuel de Jurisprudence Musulmane (Minhaj at Talibin), 3 vols. Batavia 1882-1884. Arabic text with French translation and notes published by order of the Dutch Government of Batavia. [Minhaj.]

——, Fath ul Qarib. Leide, 1894. [F.Q.]

West (Sir R.) and Bühler (G. J.), Digest of Hindu Law ; third edition. Bombay, 1884. [79.]

Wherry (Rev. E. M.), Commentary on the Koran (the version used by Mahomed Yusoof). 1882.

Williams (Sir R. L. V.), on Executors ; tenth edition, 1905. [235.]
Wilson (H. H.), Glossary of Indian Terms, 1854.
Wilson (Sir R. K.), An Introduction to the Study of Anglo-Muhammadan Law. 1894 [Introd. A. M. L.] And see *Asiatic Quarterly Review.*
Wright (W.), Arabic Grammar ; third edition. 1898. [100.]
Young (Geo.), Corps de droit Ottoman, 7 vols. ; Oxford, 1905-1906. [49, 227.]

ORTHOGRAPHY.

In extracts from other works, and in references to law-reports, the original spelling has been preserved. Elsewhere, proper names and other Oriental words are spelt generally according to the system adopted by the Indian Government and by Dr. Hunter in the "Rulers of India" series; except that the accents, which are an essential part of the system, are given *only in the Index*. According to that system, the vowels have the following sounds:—

a, as in woman (= *u* in fun); *â*, as in father;
e, as in egg;
i, as in kin; *í*, as in police;
o, as in cold;
u, as in bull; *ú*, as in rule;
ai as in Greek (= *á í* as above);
au, as in German (= *ow* in fowl).

The Arabic guttural semi-vowel *ain* is indicated, generally in the Index and occasionally in the text, by an inverted comma over the vowel which follows it.

kh, unless the letters are separated by a hyphen, represents a single sound resembling that of *ch* in "loch."

For a few very well-known names, such as Calcutta and Bombay, the old fashioned spelling is retained even in the Index.

Transliteration in the strictest sense, which would distinguish, by diacritical points and other devices, every separate Arabic letter, has been nowhere attempted The letter *z*, for instance as used in the word *jzya zimmi, kazi, zihar*, represents four different Arabic letters, with phonetic values doubtless clearly distinguishable by Arab ears, but for which none of the various transliterations are very helpful.

HISTORICAL AND DESCRIPTIVE INTRODUCTION.

HISTORICAL AND DESCRIPTIVE INTRODUCTION.

I.

THE POSITION OF ISLAM IN INDIA: ITS EXTRANEOUS ORIGIN AND COSMOPOLITAN RELATIONS.

THE laws of British India, like the laws of all other countries, are in part of universal application, and in part operative only on particular classes of the community. But in the leading communities of the modern world the special laws regulate only a few of the concerns of relatively insignificant minorities; such are in England the rules for the celebration of Jewish and Quaker marriages, and the few privileges and disabilities attached to peers and women. The peculiarity of British India is that these proportions are reversed as regards an important part of the civil substantive law, namely, the rules relating to marriage, succession, and some other matters more or less closely connected with family relations, so far as these come within the cognisance of the Civil Courts. In regard to these matters the Courts are required to take as their rule of decision the Hindu Law where the parties are Hindus, the Muhammadan Law where they are Muhammadans, and in Burma the Buddhist Law where they are Buddhists—over and above the general recognition, common to England and India, of special customs satisfying certain conditions and proved by proper legal evidence for the purpose of the particular suit.

Now, it so happens that of the entire population of British India the religions above mentioned claim collectively nearly 92 per cent., and even from the remainder some further deductions have to be made in order to arrive at the percentage actually governed in family matters by the general territorial law of India. Sikhs and Jains, though not included among Hindus in the census, are judicially considered to be governed by Hindu Law as modified by their respective special customs; Parsis have their own succession and matrimonial laws now embodied, at their own request, in Acts of the Indian Legislature; and these three classes make up together another two millions or so. Again, the bulk of the purely European inhabitants are mere birds of passage, retaining therefore, in matters of marriage and succession, the law of their domicile, whatever that may be. And, lastly, Christians, both native and European, have been separately legislated for in respect of marriage and divorce. Thus the classes to whom alone a general code of family law would be applicable are numerically so insignificant that the completion of such a code might seem at first sight to be one of the least pressing duties of Government. It will perhaps be differently regarded by those who realise that, unless and until we offer some tolerable alternative, we cannot possibly tell how many of the other 91 or 95 per cent. are really content with the antiquated

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legal systems which we insist on administering to all who happen to have been born under them ; systems which we profess to maintain solely out of deference to native sentiment, yet the popularity of which we never think of testing by a vote, and for the amendment of which by those concerned we provide* no constitutional facilities. The justification or excuse for this masterly or unmasterly inactivity is that, all these diverse personal laws being religious laws, purporting to rest on some ancient and infallible revelation, all who profess the religion must be assumed to wish the laws unchanged—an assumption hardly borne out by the general history of religion.

Of the religions affecting personal status, by far the most important, numerically speaking, is the Hindu, claiming in round numbers 217½ out of 313½ millions, or more than 69 per cent. of the whole of our Indian Empire. With these we are not here concerned ; but next to the Hindu comes the Muhammadan, with 66½ millions, or 21 per cent. If we exclude from our reckoning the inhabitants of feudatory states the number will be, according to the census of 1911, nearly 57½ millions, and over 23½ per cent. of the population of strictly British India.

Of this vast aggregate, 24 millions, or three-sevenths of the whole, are located in the Bengal province as now constituted ; 13 millions, or not far short of a quarter, are in the Panjab and N.-W. Frontier ; 6½ millions in the United Provinces ; 4 millions in the Bombay Presidency, and nearly 2¾ millions in that of Madras ; while the Central Provinces, with Berar, show not much over half a million, and Burma only 420,000. In Bengal, Panjab, and the North-West Frontier Province, as well as in Kashmir State, they are in a decided majority. To explain how they come to be where they are, how their religion, on which their family laws depend, has come to be what it is, and how it comes to pass that this part of their legal system and no other has been preserved to them under a non-Muhammadan Government, seems to be a desirable, if not absolutely necessary, prelude to a Digest of Anglo-Muhammadan Law.

Of the two chief religions of India, one is indigenous, the other imported ; it is with the imported one that we are here concerned. The long and varied history of Hinduism, or Brahmanism, belongs entirely to India—at least, if it has an ultramontane source we must go back full three thousand years to find it. The Muhammadan religion did not begin to make a serious impression upon India till about nine hundred years ago,* when it had already a history extending over three and a half centuries, and had received almost all the development that is recognised by the Orthodox Schools. Even if we accept the rather surprising estimate of a recent writer † that at least 90 per cent. of the present Mussulman inhabitants of India are Indians by blood, as much children of the soil as the Hindus, and that only 10 per cent., or less, are descended from immigrants who brought their religion with them ready-made, this will not destroy, or materially diminish, the significance of the fact that the religion of Islam has, what Brahmanism has not, a cosmopolitan character and a local centre outside India. The obligation of pilgrimage to the Holy Cities of Arabia, more easily fulfilled now than formerly, keeps the Indian Moslem in close touch with his co-religionists all over the world, and

* Three centuries earlier as regards that small portion of India that lies in the Indus Valley.

† Townsend, "Asia and Europe." p. 43

proportionately detached from purely Indian interests ; or, if he happens to be heterodox, a similar effect is produced by pious journeyings to Meshed or Kerbela. The standard authorities to which he refers on questions of faith or morals are the common possession of his sect or school in all countries, and were not (with one exception) produced in India. Hence the necessity for taking Arabia in the seventh century as the starting-point of our studies.

II.

ORIGIN AND DEVELOPMENT OF MUHAMMADAN LAW. THE KORAN AND THE TRADITIONS, AND THE FIRST DIVISION OF SCHOOLS.

THE career of the Prophet Muhammad need not here be described. All that we are now concerned with is the part played by him as law-maker—

(1) Directly and intentionally ; and

(2) Indirectly and unintentionally.

For the legal system under review differs, it is believed, from other modern systems, in that it purports to have for its sole source the Divine will communicated, in its final form, through a single human channel. The Mosaic Law comes nearest to it in this respect ; but whereas the Jew speaks of "the law and the prophets," orthodox Moslems acknowledge no divine inspiration subsequent to Mahomet, while holding all previous revelations, however genuine and important in their day, to have been absolutely merged in his revelation.

The Hindu derives his law from the Shastras, which in their turn purport to interpret and expand the Vedas. Both are vaguely spoken of as revealed from Heaven, but there is no attempt to specify the date at which, or the person through whom, any portion of the vast heterogenous mass was communicated.

The Christian has also his sacred Scriptures ; an earlier collection common to himself and the Jew, and a later distinctively Christian. He has also, like the Jew and the Moslem, a single historic personage whom he reveres as the founder of his religion. But the New Testament, unlike the Pentateuch and the Koran, does not purport to have been written by the founder, but by diverse disciples of his many years after his death. Those disciples, again, writing under a regular government whose legislation they had no means of influencing, and which they expected to see vanish in the near future at the second coming of their Master, were very little concerned about questions of civil and criminal law. They were guided by quite other considerations in composing their fragmentary records of the sayings and doings of Jesus, confined practically to the last two years of a short life, during no part of which (unless possibly for a few hours of the last week) was he called upon to perform any of the functions of a temporal ruler. Hence it follows that there is no such thing as Christian Law, either in the sense in which we speak of Hindu Law or in the sense in which we speak of Jewish or Muhammadan Law. There is, indeed, an opinion, still very widely spread, and at one time universal in Western Christendom, that the visible organisation known as the Catholic Church, with the Pope at its head, is a perpetual depositary of

infallible truth on all subjects, and therefore on civil rights, and under the influence of this opinion a body of law, known as the Canon Law, took shape, and obtained recognition from all the various potentates of medieval Europe. The Courts specially employed in the administration of this kind of law were, and are, called Courts of Christianity (*Curiæ Christianitatis*). But even when the Papal power was at its zenith, this semi-sacred law never covered so much as half the entire field of jurisprudence, not to mention that it was itself drawn in part from pre-Christian sources, both Roman and Germanic. And in modern England, while the range of the Canon Law is extremely restricted, the general character of the system actually administered is neither Roman nor Jewish, nor specifically Christian, but has been freely moulded by the Legislature for the time being in accordance with actual needs and prevailing sentiments.*

Muhammadan sacred law (*Shari'at*) stands on a different basis. It professedly centres more round the personality and the sayings and doings of the Prophet than did even the Canon Law of the Trinitarian Christians round the personality of the deified Jesus. And its scope is infinitely wider. It enters into the minutest details of the daily lives of men, women, and children, private and public, religious and secular.

The Koran is in the form of a series of communications addressed by God to the Prophet in the second person. These communications were declared to the people on a great number of different occasions in the last twenty-three years of the Prophet's life, and dealt with a great variety of problems, one after another, as they arose. During the last ten years of his ministry these problems were partly forensic. From the time of that memorable Flight, which marks the commencement of the Muhammadan era, he had the full responsibilities of a temporal sovereign, first over the city of Medina, and ultimately over nearly all Arabia. Unlike Jesus, who pointedly declined jurisdiction in a dispute as to partition of inheritance, and skilfully evaded the question of punishing an adulteress according to the law then in force, he announced on these very subjects most explicit and imperative revelations. Nevertheless, the amount of strictly legislative matter to be found scattered up and down the Koran would go but a very little way towards the construction of a modern code.† A.D. 622.

With the death of the Prophet, the living source of inspiration came to an end. The immediate successors of the Prophet in the religious and secular leadership of Islam laid no claim to inspiration. They accepted the "Book of God" as an all-sufficient guide for this world and the next. It was reverently remembered, recited, written down, studied and obeyed. The conquests of Islam outside Arabia brought the Moslem face to face with new problems. These were solved by a process of "interpretation," which, in the case of the "Companions' 'who had shared in the Prophet's public and private life, was naturally invested with peculiar authority. But the Companions were able to supplement the explicit injunctions of the Koran with facts from the life of the Prophet and memories of the sayings of the Prophet, which helped materially to throw light on the expanding problems of the Moslem Commonwealth and on A.D. 632.

* For the Canon Law in its relation to the Law of England, see Pollock and Maitland's "History of English Law,' 16—18, and Book I, chap. v.

† See Appendix D.

the ever-widening scope of Moslem individual life,—in other words, on problems of both public and private life.

Even in the time of the first two Caliphs there was not wanting a certain cleavage of opinion, but they fought and ruled with conspicuous success, and their attitude towards their opponents was conciliatory. The voice of controversy was less hushed in the reigns of the third and fourth Caliphs, Othman and Ali. After Othman had lost his life in a rebellion, and Ali's reign had been troubled by civil wars arising out of his predecessor's death, it came to pass that while the generation of the Companions of the Prophet was still unexhausted, the power passed out of their hands to a dynasty of more doubtful orthodoxy. This merely hastened the change which lapse of time and territorial expansion must inevitably have brought about, from reliance on the Koran alone to anxious search for supplementary divine guidance. The conduct and sayings of the Prophet had always been looked upon as supplementing Revelation, but the opinion now gained ground that every act of his and his most casual utterances had the authority of inspiration. "I leave with you" (he is supposed to have said) "two guides, which if you follow faithfully you will never go astray, the Koran and my practice (*Sunnat*)." The entire system of Muhammadan Law, as well as of theology, ritual, and private ethics, has actually been built up from these two foundations. The text of the Koran is one, universally accepted by all schools of Islam. But there are varying texts of the Traditions (*Hadithes*) recording the Prophet's sayings and doings, and when we come to their application, distinct schools of Law emerge, each with its own characteristic principles.

A.D. 661—750. During the century or so of Omayyad rule this constructive process went on underground, as it were, with little help or countenance from the political ruler for the time being, and, indeed, for the most part in opposition to his wishes. Though nothing could be more opposed to the original Islamic idea than a separation between Church and State; though it was always considered that the Commander of the Faithful should also be their Imam, their religious teacher, and the leader of their devotions; the facts refused to fit the theory. In the clash of civil conflict it so chanced that the weight of pious opinion was on one side, while the superiority in strategy and statecraft was on the other. While the armies of Islam were directed from Damascus, the Holy Cities of the Hejaz and the great Arab colony at Kufa continued to be the chief centres at once of religious life and learning, and of disaffection towards the reigning dynasty. Zeal for the law of Muhammad and reverence for his family

A.D. 680. became ever more and more closely intertwined from the date of the so-called martyrdom of Husain at Kerbela—both source and prototype of a long series of similar incidents.

Grandson of Mahomet through his mother, and son of the last Caliph who could be said with any show of truth to have been duly elected at the original seat of empire, Husain not unnaturally considered himself justified in trying to upset by force of arms the arrangement made by his father's successful rival for devolution of the Caliphate in the line of his own progeny. If the primitive system of election was to be exchanged for hereditary monarchy, there was much to be said for reverting to the line of the founder in preference to continuing the line of the Prophet's old enemy. But wherever the right lay, the might proved to be on the side of the party in possession, and Husain paid with his life for an ill-

advised and ill-supported movement. Several of his descendants made the same attempt, and met with a similar fate; but other members of the family chose a safer and more pacific road to influence and distinction by simply devoting themselves to the congenial study of the life and teaching of their great ancestor. On such a subject the testimony of the *Ahl-i-Bait* (People of the House) would naturally find readier acceptance than that of strangers; and to be an authority on the life and teaching of the Prophet was to be an authority on every question of faith, ritual, ethics, or law that could trouble the minds of the faithful.

This tradition of teaching and interpretation was kept up by Imam Husain's son Ali Zain-ul-Abidin and grandson Abu Jaafar-ul-Bāqir. Pupils came to these descendants of the Prophet from all parts of the Moslem world. The Sunni Schools of Law do not derive their inspiration direct from them, but Abu Hanifa is recorded to have visited Imam Bāqir * in Medina and to have spent some time in the society of his son Imam Jaafar the Righteous (*al-Sádiq*). Abu Hanifa was a native of Irak, and his real name was No'mán bin Thábit, but he is commonly known by his Arabiased designation, d. 711. d. 736.

Abu Hanifa

(*i.e.* "father of Hanifa"),† and sometimes referred to by his admirers as the Imam Aazam, the teacher *par excellence*, or the great teacher. Diverging in some important respects from the views of his master, he established his school of law in his native city of Kufa, which was already an independent centre of learning. Abu Hanifa's school, although it was in opposition to the Abbaside power, which had been established in 750 A.D., soon attained a pre-eminence which it still retains, under the name of the Hanafi School. A.D. 699—767.

The characteristic feature of this school was that it placed little reliance on the mass of oral traditions (*hadiths*), which had not yet been reduced to writing in authoritative digests, but developed the exegesis of the Koran by a subtle method of reasoning and analogy (*qiyās*), and clearly defined the principle that the universal concurrence of the Church of Islam as represented by its doctors was in itself an evidence of God's will. This is called *Ijmaa*, and may be compared to the Christian doctrine of the Church Visible being guided by the will of God. Thus the four sources of Muhammadan Law, *viz.*: the Koran, the Hadith, Ijmaa, and Qiyás, which were commented on so copiously by later writers, were already classified and described within 150 years of the Hijre. Only different schools laid a different degree of stress on one or more of them, the Koranic text being accepted by all without question, though its exegesis occasioned differences of opinion and resulted in some cases in legislation by interpretation, according to the bent of each several schools. This legislation by interpretation was not confined to judicial interpretation, but was developed in a movement which reminds us of the "*Responta Prudentium*" of Roman Law. This movement has always been powerful in the development of Muhammadan Law.

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* Shibli, Life of Abu Hanifa, p. 44.

† The name Abu Hanifa does not refer to any son of that name, but to the "upright religion" *millat ul Hanifa* (one of the titles of Islam. See Shibli's Life of Abu Hanifa Urdu, p. 21).

Here are a few specimens of Koranic interpretation according to the Hanafi School, taken from the "500 texts importing command," set forth in Mahomed Yusoof's Tagore Lectures, 189—192 :—

Specimens of Koranic Interpretation.

K. ii, 110. They say, God hath begotten children; God forbid! To Him belongeth whatever is in heaven and on earth; all is possessed by Him!

Comment.—M. Y. vol. i, p. 69, text 6.

"A child becomes free by being owned by the father [*e.g.*, if the father has been emancipated while his son remained in slavery, and then purchases the son from his master]. That is to say, everything on earth being owned by God, God could have no son : therefore ownership and sonship are used in the text as contrary notions; and therefore when ownership and sonship combine, the former must give way, and the son must become free."

K. ii, 137. "Thus we placed you, O Arabians, an intermediate nation, that ye may be witnesses against the rest of mankind, and that the Apostle may be a witness against you."

Comment, p. 69, text 9.—"That Ijmaa, or the concurrence of the Law Doctors, is a source or authority of law."

K. iii, 106. "Ye are the best nation that hath been raised up among mankind; ye command that which is just, and ye forbid that which is unjust, and ye believe in God."

Comment, p. 72, text 92, same as above.

K. ix, 34. "O true believers, verily many of the priests and monks devour the substance of God in vanity, and obstruct the way of God. But unto those who treasure up gold and silver, and employ it not for the advancement of God's true religion, denounce a grievous punishment. On the day of judgment their treasures shall be intensely heated in the fire of hell, and their foreheads, and their sides, and their backs shall be stigmatised therewith; and their tormentors shall say, 'This is what ye have treasured up for your souls; taste therefore that which ye have treasured up.'"

Comment, p. 79, texts 245 and 246.—Poor-rate, or *Zakat*, to be paid on stored gold and silver.

K. vi, 38. "There is not a beast upon the earth, nor a bird which flies with both its wings, but is a nation like unto you; *we have omitted nothing from the Book;* then to their Lord shall they be gathered."

The commentators infer from the words italicised that there must be in the Koran, a solution of every possible difficulty.

It must be confessed that some of the analogies used by the juristic doctors in the process of interpretation are a little far-fetched, as they themselves point out in their criticisms of the deductions of rival schools. But it is to their credit that, however peculiar their reasoning, they generally reach right conclusions on their premises. The Hanafi School, in particular, is, like the authoritative expounders of Roman Law, characterised by strong commonsense and a desire to take account of the facts and logic of life. They are almost pedantic in their desire to avoid any subservience to the ruling power. Abu Hanifa suffered imprisonment rather than accept office under the Abbasides. As Maulvi Shibli points out,* his

* Abdullah Ibn Abbas, son of the Prophet's uncle, and ancestor of the Abbasside Caliphs, was naturally a high authority, and is credited with a very large number of traditions.

system was particularly favourable to the Zimmis, the non-Muhammadans who lived under the protection of the Muhammadan State. He also avoided the tendency to interpret texts too literally.

The second Orthodox School of Muhammadan Law was founded by a younger contemporary of Abu Hanifa,

MALIK IBN ANAS,

from whom the Maliki School derives its name. Imam Malik lived and taught in Medina, where he held the position of Mufti. The Medina atmosphere of direct tradition pervades the whole system, whose spirit is opposed to the speculative freedom of Abu Hanifa. Malik, however, while laying more stress on tradition, did not rule out *qiyas*, or "analogical deduction." On the other hand, the followers of Abu Hanifa illustrated many of the analogical deductions of their master by an appeal to the positive letter of the Hadith. In this way any sharp antithesis between the methods of the schools tends to be softened in the hands of their followers. Abu Yusuf, the immediate successor of Abu Hanifa, is said to have been a most accomplished traditionist, and the chief Hanafi works now current are full of examples of the traditional method. Its use will be best understood from examples. A.D. 713—795.

Examples of Hadiths.

Here, for instance, is a tradition intrinsically credible, consistent with the indications afforded by the Koran, and affording guidance on a matter of practical importance. It is from the *Mishcat ul Masabih*, vol. i, p. 404.

*Ibn Abbas.**—There is a tradition from him that the Prophet sent Mua*dh* Ibn Jabal to Yemen; that is, he made him judge and chief of it; and ordered him, saying, "You are going among the people of the Book; then first invite them to give evidence that there is no god but God, and that Muhammad is the messenger of God; and if they obey that, and be Muslemans, then instruct them that verily God has ordained His Divine command on them, of five prayers in the day and night; and if they obey the five times of prayer, then instruct them that verily it is a Divine order on them to give alms; that is, charity to be taken from the rich and given to their poor."

It harmonises with and supplements the general references to obligatory prayer and "almsgiving" (more properly tax-paying, when brought within the province of the Law) in the Koran, and agrees with many other traditions in referring these two institutions, in the exact form that they have preserved to this day, to the very beginning of Islam. The sending of Mua*dh* to Yemen, being the most important delegation of administrative authority that occurred in the Prophet's lifetime, would be a most natural occasion for such instructions to be formulated with special publicity and precision. Sir William Muir gives a more detailed account of the same transaction from some source not specified.†

Another tradition concerning the same Mua*dh* is curiously apposite in defining the order of importance to be observed in the development of law to the Koran, the Traditions, and to the judgments of human reason.

* Life of Abu Hanifa, p. 258.

† "Life," p. 442.

It is said that Mahomet asked Muadh how he would adjudicate causes. By the Book, he replied. But if not in the Book? Then by thy precedent. *But if there be no precedent? Then I will diligently frame my own judgment*, and I shall not fail therein. Thereupon Mahomet clapped him on the breast, and said, "Praise be to God, who hath fulfilled in the messenger sent forth by his Apostle that which is well pleasin to the Apostle of the Lord."

At the opposite pole of credibility we have such traditions as the following, gravely recorded in the Mishcat, vol. i, p. 32.

Ibn Abbas.—"The Prophet of God said: 'There are two sects among my followers that will not benefit by Islam; one of them Murjiah, and the other Kaderiah'"—these being the names of two sects which were first heard of about a century after the Flight.*

We shall have occasion to notice in the body of this work cases in which a saying of the Prophet has obviously been suggested by other considerations of a problem very unlikely to have forced itself on the Prophet's attention.

On the other hand, there is a large class of traditions which may well be true, but which relate to exceedingly trivial matters. From indications in the Koran itself, and from the nature of the case, it is evident that Muhammad's daily life at Medina was, to an extraordinary degree, open to observation, and actually observed. He needed, in fact, a special revelation to secure for him the indispensable minimum of privacy.† Not only would every gesture and word be noted for imitation, but there is no reason to doubt, what the traditions throughout imply, that the faithful of all ranks and of both sexes were encouraged to consult him about the minutest details of their personal affairs. Such anecdotes as the following, for instance, are as likely as not to be true.

Miscat ii., 318, 319. "Cab bin Malik said: 'The Prophet used to eat with three fingers the thumb, the forefinger, and the middle finger; and after eating he used to lick his blessed fingers before touching anything else.'"

"'Ayeshah said: 'I heard the Prophet say, "Gruel is a comforter to the sick and allays their melancholy."'"

"Anas said: 'A tailor invited the Prophet to dinner, and I went along with him; and the tailor placed barley-bread near the Prophet, and soup, in which was pumpkin and salt meat. Then I saw the Prophet looking out for pieces of pumpkin in the bowl, and ever since that day I have been fond of pumpkin.'"

What sensible men thought that the Prophet would have thought of retailing such gossip, as if it were Scripture, may be gathered from another story in the same collection.

"Rafi Ibn Khadij said: 'The Prophet came to Medina when the people were inserting the male bud of the date-tree into the female, in order to produce a greator abundance of fruit, and he said to them, "Why do you do this?" They said, "It is an ancient custom." The Prophet replied, "Perhaps it would be better were you not to do so." And they left it off, and the tree produced but little fruit. The people then complained to Mahomet, who said, "I am no more than man; when I order you anything respecting religion, receive it; and when I order you about the affairs of this world, then I am nothing more than man."'"

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* See, as to these sects, Von Kremer, "Culturgesch." II, 398, and Browne, "Lit. Hist. of Persia," vol. i, pp. 279, 282. Both represent earlier phrases of that rationalising movement whose later exponents were known as Motazilas, and which culminated in the reign of Al Mamun.

† See K. xxxiii., 53.

The Hedaya, a Hanafi compilation of the twelfth century, which makes a point of setting forth at length the arguments for and against every disputable proposition, habitually reinforces general reasoning by tradition, as in the following example :—

"Contracts of Mozaribat * are authorised by the law from necessity ; since many people have property who are unskilled in the art of employing it, and others, again, possess that skill without having the property : hence there is a necessity for authorising these contracts, in order that the interests of the rich and poor, and of the skilful and unskilful, may be reconciled. *Moreover, people entered into such contracts in the presence of the Prophet, who did not prohibit, but confirmed the same ; several of the Companions, also, entered into these contracts.*"

Both Abu Hanifa and Malik had made their reputations while the Omayyads were still supreme. Both, like most of the devouter Moslems, were politically disaffected to that dynasty, and made no secret of their desire to see the Caliphate restored to the family of Muhammad. But when the revolution came to pass for the benefit, not of the direct descendants of the Prophet, but of the collateral Abbasside line, they were almost as much in the cold shade of opposition as before. Abu Hanifa died in prison under the second Abbasside Caliph, sturdily refusing to accept the judicial office pressed upon him, because he knew that he would be expected to give decisions contrary to his conscience. Malik suffered personal ill-treatment at the hands of the first Abbasside, but was probably safer on the whole at Medina, which he never left except for an occasional visit to Mecca, than he would have been at Bagdad, and he lived to receive a visit from the fifth Abbasside, Harun al Rashid, before whom he conducted himself with much dignity, refusing to teach the young princes unless they were sent to take their place in class with the rest. While, however, the Caliph was willing (or perhaps dared not refuse, in the city where Malik's repute stood so high) to treat the great traditionist with the respect due to his age and learning, his chosen adviser in legal matters was Abu Yusuf, the equally learned, but more courtly and pliant, successor of Abu Hanifa ; and thus the Hanafi doctrines became current at the seat of empire, while those of Malik were diffused westward along the north coast of Africa, and were specially patronised by the rival dynasty, an offshoot of the Omayyads, now established in Spain. The latter still form the groundwork of the usages observed in Morocco and Algeria, and have consequently received much attention from French scholars ; M. Perron asserts that the Maliki school prevails in all parts of Africa except Egypt (*Précis de Jurisprudence Musulmane*, vol. i, p. x.) ; according to M. Clavel (*Wakf on Habons*, vol. i, p. 276), the Hanafi and the Maliki schools are both generally followed in Tunis, but he does not attempt to decide which is the more prevalent. But the student of Indian Law has no direct concern with the Maliki school.† What we have to do is

* Something like the French *Societe en Commandite*, in which one carries on trade with capital supplied by the other, and the profits are shared between them.

† A Maliki kazi figures at the Court of Akbar in a curious anecdote told by the hostile chronicler, Badaoni ; see Blochmann's *Ain i Akbari*, vol. i, p. 173, and my Introduction to the Study of Anglo-Muhammadan Law, p. 79. I have somewhere come across one other mention of a Maliki in India ; but no question of Maliki Law has ever, so far as I know, come before our Courts. For European readers the best source of information as to this system is the French rendering of Sidi Khalil, A.D. 1366, entitled, "Précis de Jurisprudence," by N. Perron (Paris, 1844). A more elementary and easily accessible is : First steps in Muslim Jurisprudence, being Arabic extracts from the compendium of Ibu Abu Zaid (A.D. 996), with a English Translation, Notes, and Introduction, by A D. Russell and

to follow the course of Hanafi jurisprudence, together with that of those rival systems with which it had to contend in Central Asia, and which still exist side by side with it in India. With one of these its relation is that of sharp antagonism ; with the other that of fundamental agreement, though the differences are not altogether unimportant.

NOTE.

In converting dates of the Christian Era, which is used throughout this Introduction, into dates A.H. (year of the Hijra, or Flight from Mecca), it must be remembered that the Muhammadan years are lunar, consequently the rule is (for approximate calculations) to subtract 622 from the date A.D., and then to increase the remainder by three per cent. Thus 1919—622=1297, and 1297+39=1336, which is just short by one year, the present Hijra year being 1337.

A. M. Suhrawardy London, Luzac 1906. More recently, 1916, Mr. F. H. Ruxton has published, by order of the Governor-General of Nigeria, his English book, *Maliki Law*, being a summary from three French Translations of the Mukhtasar of Sidi Khalil (including that of M. Perron), with notes and a bibliography. A short French book, *Droit Musulman, Malekite*, by F. Cadoz, contains some just criticism of M. Perron's translation of the Khalil, and sets out to prove that the principles of Muslim Law, properly understood and applied, are not opposed to the civilised development of Muslim peoples, and (except for the law of divorce and succession) are even consistent with the application of the French Civil Code to the Arabs of Algeria.

III.

THE SCHOOLS OF SHAFEI AND IBN HANBAL.

THE elevation of Abu Yusuf to the post of Chief Justice (Kazi of Kazis) under the greatest of Abbasside Caliphs marks the definitive triumph, so far as the main current of Muhammadan history is concerned, of that school of law which has ever since been known by the name of his teacher, Abu Hanifa; not, however, without undergoing considerable modification at the hands of its second founder, as he almost deserves to be called. Abu Yusuf is pictured to us as at once a prodigy of learning and a man of the world, with much tact and few scruples, who would make it his first business to please his royal master, and his next business to meet the general convenience, within the limits of what was possible for ingenuity to reconcile with the known will of God as communicated through the Prophet. If so, he would not be the man to allow his rivals a monopoly of so powerful and popular a line of argument as that from tradition; accordingly we are not surprised to be told that he was himself an accomplished traditionist, and to find, in the extant Hanafi treatises which preserve the substance of his teaching, this method freely used concurrently with the *qiyas*, or analogical interpretation of Scripture, which was characteristic of his master. His younger contemporary, Muhammad as Shaibani, who is commonly coupled with him as one of "the two disciples," was more akin in character to their common master, but had qualified himself for the exposition of the Sunna by a long course of study under Malik. Thus, according to this system as ultimately developed, there were four distinct sources to which it was permissible to resort for the solution of theological, ethical, or forensic perplexities; namely— d. A. D. 798.

1. The Koran, naturally interpreted.

2. Tradition, *Hadith*, known collectively as *Sunna*.

3. *Ijmaa*, concurrence, meaning propositions shown to have been accepted as indisputable under the first four "Rightly Directed" Caliphs, or in later times, by those who attained to the dignity of being Mujtahids.

4. *Qiyas*, *i.e.* analogical deduction from the reason of a text to a case not actually covered by its language.*

Some of the applications of this last method by the courtly and worldly Abu Yusuf were rather calculated to shock the austere and devout, and the feeling that it is necessary to make choice once for all and absolutely between reason and authority is so familiar to Western experience that we can very easily understand the revival of uncompromising traditionism after the death of "the two disciples." That re-action gave rise successively to two other quite distinct schools, the Shafei and the Hanbali,

* As to (3) and (4), see *Addendum* to this section (*vide* p. 18).

which maintain their separateness to this day; other schools also arose, which have ceased to have any importance now.

A. D. 767—820. The founder of the third Sunni school, Muhammad as Shafei, is said to have been born at Gaza in Palestine on the day of Abu Hanifa's death, but from a very early age had his home at Mecca, whence he could easily visit Medina to study under Malik. Tales are told of his extreme precocity, so that at the age of fifteen he was already quoted as a sort of authority. He visited Baghdad A.D. 810–811, and again in 813. In 814, instead of returning as before to Mecca, he went to Egypt, and spent the rest of his life in old Cairo, where he died A.D. 820, and where his tomb is still shown. It is worth noting that the years of his stay at Baghdad coincide with the brief reign of Al-Amin, the elder son of Harun al-Rashid, who in 814 was defeated and killed by his brother Al-Mamun. From Muir's account it seems doubtful whether the latter had effective possession of Egypt during any part of the remaining six years; so it looks as though Shafei were politically an adherent of the beaten side, and cast in his lot with the irreconcilables who kept up the struggle after the death of their chief.* We shall see presently that the scholars who gathered round Al-Mamun were mostly at the very opposite pole of thought to that of the stricter Sunnis. The commentators on whom we depend for our knowledge of Shafei's teaching note a marked change in his views on many points after his visit to Baghdad and settlement in Egypt. In that country the school named after him seems to have predominated, except when overborne by Shia rule in the tenth and eleventh centuries, down to the Turkish conquest in 1517, since when the Hanafi doctrines have been officially patronised. But the Shafei school holds its own in Southern Arabia. From the shores of the Red Sea the course of trade and colonisation carried the Shafeite teaching to the East coast of Africa and the West coast of India, and thence to the Eastern Archipelago, where at the present day the Muhammadan subjects of the Dutch are mostly of that persuasion, so that we are indebted chiefly to the Dutch Government for our knowledge of the standard works of that school. Not entirely, however, for a reason to be presently mentioned.

Meanwhile, in the countries more directly under the sway of the Baghdad Caliphate, the cause of Scriptural literalism and traditionism had to encounter something very different from the mild infusion of rationalism which had mellowed the teaching of Abu Hanifa and the two disciples, and found on its side an even more uncompromising, or at least more combative, champion than Malik. It is said that when Shafei left Baghdad he declared that he had not left behind him a more pious man, or a better jurist, than Ahmad Ibn Hanbal.† It was not long before the latter's piety and fidelity to principle were put to a rude test. The reign of Al-Mamun had now commenced, at whose Court profane learning was encouraged, and much bolder speculations than would have been tolerated under his father.‡ The claim for

A.D. 780—855.

A.D. 813—833.

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* The story that he was politically a Shia (Hammer-Purgstall, iii. 107) seems from the context to be only an unwarranted inference from the fact that (like all devout Moslems) he spoke of Ali with profound respect. At the same time it must be noted that the rigid distinction of Shias from the general body of Sunni Muslims arose later, and was emphasized by the rise of the Shia Persian Dynasty.

† Osborn, "Khalifs of Baghdad," p. 41.

‡ See Introd. A.M.L. p. 51.

toleration of new ideas ripened rapidly in the sunshine of royal favour into a demand for suppression of the old, or at all events for persecution of those whose alarm at the insidious advance of rationalism tempted them to broach new theories in support of the old orthodoxy. The particular anti-heretical heresy, or ultra-orthodox dogma, for which Ahmad Ibn Hanbal, among others, endured stripes and imprisonment, was that the Koran was uncreated; the notion underlying their obstinacy being, apparently, that if the Koran were once admitted to have had a beginning, the next step would be to argue that the time might come—nay, might be close at hand—when its exclusive authority would come to an end; or that one of its precepts after another might be quietly shelved as of merely temporary application, suitable perhaps to Medina in the first, but not to Baghdad in the third, century of the Hijra. It may be that they had in their minds, not simply the successive messages collected into a moderate-sized volume after the death of Muhammad, but the great register preserved in heaven, from which these messages purported to be extracts, and to which the Prophet was believed to have had free access; in his own expressive phrase, "the mother of the book." In this view every act and saying of the Prophet might be regarded as a new revelation of some portion of the celestial Koran, and all taken together, if diligently studied and properly interpreted, ought surely to suffice for guidance in every possible contingency. In this way the dogma of the uncreated Koran and the blind reliance on tradition would be closely connected parts of a single system. Whether attachment to this dogma was common ground between the Shafeites and Hanbalites, is a question that need not detain us in a discussion on jurisprudence. The fact remains that the son of Hanbal collected and guaranteed the genuineness of a vast number of new traditions, presumably inculcating a proportionate amount of novelty in belief, or practice, or both, and that his innovations were certainly not in the direction of greater rationality. Imam Hanbal was the only one among the founders of the four schools who, besides being a jurist, had a recognised status in the independent Science of Hadithes,—as one who collected, tested, and expounded them. But his school of law has a more limited following than the other three schools. The Hanbalite influence had sunk to zero in Central Asia before the career of Islam in India commenced, and it is said that the sect is now to be found only in Central Arabia, round the Persian Gulf, and in isolated places in Central Asia and Syria.*

The Shafeites, on the contrary, held their own in competition with the Hanifites, at least down to the time of the Mongol invasions, if we may trust an anecdote quoted by Colonel Osborn from the Persian historian Mirkhond.†

The importance of Shafeism in Central Asia, but not the extreme rancour implied in Mirkhond's account, is evidenced about thirty years earlier (A.D. 1190) by that famous law-book the Hedaya, the compiler of which, himself belonging to the Hanafi school, makes a point of recording the opinion and arguments of Shafei on every disputed question, side by

* Aghnides, Muhammadan Theories of Finance, p. 146.

† The story is that when Chenjiz Khan was besieging Rhé, or Rai (the burial-place of the third great Hanifite doctor), the Shafeite party offered to betray the city if the besiegers would undertake to kill all the Hanifites; that the Mongols cheerfully assented to, and scrupulously fulfilled, this condition, but proceeded after a brief interval to massacre the Shafeites also.

side with those of "our doctors," with at least the show of impartiality and without the slightest indication of disrespect. And, speaking generally, the attitude of the four Sunni schools towards each other has been, and is, one of mutual toleration; at all events, in that larger portion of the Muhammadan world in which the Hanifites predominate, the general understanding is that every Moslem has a right to choose his own school and to be judged accordingly, and that every public mosque is open to worshippers of all the four schools, each being at liberty to follow his own ritual.

ADDENDUM TO SECTION III.

For more detailed information as to the Sunni law-sources, reference should be made to the valuable work of Mr. Justice Abdur Rahim on "Muhammadan Jurisprudence" (London and Madras, 1911). He is particularly full and interesting on the subject of *ijmaa*. The net result of his exhaustive examination of authorities, extending over some twenty pages (pp. 115—136), appears to be mainly negative; *viz.*

(1) That though the better opinion is in favour of the abstract possibility of Ijmaa in any age, and even of a later consensus of jurists repealing the decisions of an earlier, there are no actual recorded instances of points of law settled in this manner later than the time of the Companions of the Prophet, or (perhaps) of their immediate successors.

(2) That while it is certain that a formally summoned Council, with full deliberation and counting of votes, was never necessary for the validity of *ijmaa*, the learned are by no means agreed as to what sort of manifestation of concurrence, and by whom, is sufficient; whether absolute majority is necessary, or if not how large a majority will suffice; whether silence can be taken for consent; whether the validity of a unanimous decision remains in suspense until all the jurists who took part in it have died without changing their opinions; and whether it is necessary that the reasons for the decision should have been expressed. The author has to admit in effect that while Sunni Moslems have always recognised in theory the right of the whole community of believers to legislate on points not covered by express revelation, they have never at any period shown themselves equal to the task of constructing suitable machinery for the purpose.

Reference may also be made to pp. 77—84 of C. Snonk Hurgrouje's Muhammadanism, New York, 1916. Prof. Hurgrouje's view is that of a general observer of Islam from the outside, but it throws light on the legal aspect of *Ijmaa*.

The author also points out that where the strict application of *qiyas* would work hardship, it is sometimes corrected by the principle of "juristic preference" or equity (*istihsan*). This was a peculiarly Hanafi term, for which the followers of Shafei strongly attacked them. (See Aghnides, Muhammadan Theories, &c., pp. 94—102). The texts cited in the present work will be found to supply several examples of *istihsan*.

IV.

THE SHIA SECT.

FAR deeper and more permanent was the cleavage between the four Sunni schools on the one hand, and the Shia sect, with its various sub-divisions and offshoots, on the other. By the bitter and bloody memories that it recalls, it more than equals the great division between papal and anti-papal Christendom. Ordinarily there is no community of worship,* though this is lawful under certain reservations (*e.g.*, the Shia practice of *Taqiyat*, or conforming to outward forms). Though all sects perform their pilgrimages freely to the Holy Cities, the Orthodox Sunni sects enjoy special recognition, owing to the predominance of a Sunni Power in these Cities. Shia and Sunni have not hitherto worked out a Concordal in regard to mutual recognition of each in countries dominated by the other, though signs of a distinct rapprochement are not wanting. But the *odium theologicum* still pervades the writings of the learned. The best-known Shia law-book refers now and then, in terms of unmitigated contempt, to the opinions of "the vulgar sect," and conversely, the only reference to Shias in the Hedaya is under a contemptuous nickname, and for the purpose of considering whether they are, after all, so bad that their evidence ought to be refused in a Court of justice. It is mentioned that Shafei went even that length, but the author of the Hedaya inclines to the more lenient view, that a fool is not necessarily a liar.

The dynastic origin of the disruption has already been noticed. We have seen that down to the collapse of the Omayyads, all the great doctors of the faith, and developers of the Sacred Law, were politically arrayed on the same side, in secret or open opposition to the reigning dynasty; so that if we accept the tradition that the name was first applied to Ali and his followers † as far back as the "Battle of the Camel," in contradistinction to his then antagonists, the would-be avengers of Othman, we must either make it include Abu Hanifa and Malik as well as Jaafar as Sadik, or conclude that after the controversies which divided the followers of Ali's family, it was revived under the Abbassides with a somewhat different signification. As against the usurping Omayyads, A.D. 657.

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* On this subject the modern Indian practice is certainly more liberal. The mosque built by the late Dr. Leitner at Woking has been used for services in which both Sunnis and Shias participated, and united services are arranged for the students of the Muhammadan Anglo-Oriental College at Aligarh. The right to enter a public mosque managed by the other sect, and to perform one's private devotions in such a manner as not to interrupt the public worship, is a different matter; and *this* right seems to be mutually conceded by Sunnis and Shias in British India (see under s. 347, *post*).

† Or assumed by them. It was not likely to be employed as a term of reproach, seeing that it occurs twice in the Koran, denoting in each case a member of the sect or party favoured by the Almighty. K. xxviii. 15: "He [Moses] found two men fighting, the one *of his sect*, and the other of his foes." K. xxxvii. 15: "Verily of his [Noah's] sect was Abraham."

nearly all who took the divine mission of Muhammad seriously, and put religion above statecraft, had been partisans ("Shias") of the Prophet's family, reverencing them collectively as the chief depositaries of the sacred traditions, and inclining to the belief that the Commander of the Faithful should if possible be selected from among them. But when the actual course of events gave the prize to a descendant of Abbas, to the exclusion of the direct descendants of Ali and Fatima, the unanimity of the faithful was no longer so complete.

On legitimist principles, assuming that the devolution of the Caliphate ought to follow the analogy of the divine regulations respecting private inheritance, the Aliite, or Fatimite, party had a strong, but not absolutely conclusive, case. So far as the Koran itself was concerned, the right of a daughter's son to succeed in preference to an uncle, or at all, was left open, and as we shall see hereafter each sect had its own traditions on the point. Supposing that right to be denied, the contest was between the representatives of two paternal uncles of the Prophet, of whom Abu Talib, the father of Ali, was certainly the senior; but against this it was argued that Abu Talib, though he had been like a father to Mahomet, and defended him to the last at the risk of his life, never acknowledged his prophetic claims, and died in unbelief, whereas Abbas was a convert, though a late one, and died in the faith of Islam. As a practical question, the choice lay between accepting accomplished fact in the shape of cruel, unscrupulous, but decidedly able rulers, and conspiring on behalf of some untried scion of the house of Ali. We have seen that the founders of the two oldest Sunni schools risked their lives rather than accept office under the new government; but that the elder of the "two disciples" of Abu Hanifa was closely identified with the fifth and greatest of the Abbasside Caliphs, and the younger also to some extent, though less completely. Meanwhile the descendants of Ali were themselves divided, as they had been under the former dynasty, between those who were for trying to recover by force the sovereignty which they imagined to be theirs by hereditary right, and those who were content with the spiritual influence which their descent, coupled with the kind of piety and learning appropriate to such descent, would always ensure them. When he saintly and univers-
A.D. 765. ally respected Jaafar as Sadik died peacefully at Mecca, under the second Abbasside, these sharply contrasted ideals seemed to be impersonated in the respective descendants of his two eldest sons.

The elder, Ismail, disinherited by his father, continued nevertheless to receive the allegiance of a section of the party, and from him descended a series of "concealed Imams," whose secret emissaries were constantly on the watch for a chance of striking at some weak point in the large, ill-cemented empire of orthodox Islam. This was the source of several short-lived dynasties in North Africa; of the Fatimide rule in Egypt (909–1160 A.D.); of the strange sect of the Druses which still survives in the Lebanon valleys; and of the "Assassins," who in the twelfth and thirteenth centuries made a remote mountain fastness near the Caspian Sea the seat of a sort of invisible empire, and whose Arabic name ("The Drugged") has been naturalised in our own and most other European languages with a different and more terrible meaning, corresponding to the practice by which they made it dangerous to curse Ali or any of his descendants, or their own Grand Master in particular, in any part of the Muhammadan world. In this way these Ismailian Shias contributed

some specially blood-stained pages to Asiatic history, but they are not known to have made any distinctive contributions to Muhammadan Law.*

When we speak of Shia Law, we mean the system developed within the main body of the sect who are called, in contradistinction to the Ismailiyas, Isna-Ashariyas (*i.e.* "Twelvers"), because they trace the legitimate succession to the Imamate through twelve known individuals after which the existence of the Imam became a matter not of sight but of faith. The seventh of the twelve was that Musa Kazim whom his father Jaafar as Sadik, according to the "Twelver" version, preferred to the disinherited Ismail; he died in prison under Harun al Rashid. The eighth, Ali Raza, was at first approached amicably by Al-Mamun with a view to the reconciliation of the rival houses by intermarriage; but an Aliite rebellion rendered the scheme so unpopular that it had to be abandoned, and Ali's death followed with suspicious opportuneness. The eleventh died in prison under Mutawakkil, and the twelfth, a mere boy, plunged into a well to escape pursuit and was never seen again (A.D. 873). He it is who, in Shia belief, is to re-appear some day in glory, and in whose name the law ought in the mean time to be administered. Six centuries more were to elapse before the Shia system, as developed by the successors of Jaafar as Sadik, was put to the test of actual administration for any considerable length of time by the regular government of a large kingdom. But meanwhile the lack of direct political power did not prevent the visible Imam for the time being, or any accepted representative of the invisible Imam, from wielding a very effective spiritual power over the scattered members of the sect, and from being constantly called upon for solutions of all sorts of questions, theological, ceremonial, ethical, and forensic. Long before Ismail Safavi (A.D. 1499) made Shiaism the State religion of Persia, as it has been ever since, its literature had become as voluminous and its practice as well settled, as that of the Sunnis. In fact, the compiler of what is now the most generally used text-book,† summing up the labours of a host of earlier teachers, died 1280 A.D., only a few years after the extinction of the Baghdad Caliphate, while the Mongolian conquerors had hardly made their choice for Islam as against other religions, and while the learned generally had sought shelter from the storm at the Court of Delhi. Of the successors of Hulagu who did profess Islam, one or two favoured the Shia form, though the majority were Sunnis. For various reasons it had from the first specially attracted the men of Persian race; and at last, after seven centuries of underground work, the edifice rose complete, compacted of nationality and religion, and henceforth presented a solid rampart against the Turkish Empire to the west, and the Mogul Empire of India to the east, both of which patronised the Hanafi form of Sunni orthodoxy. With the Shias as with the Sunnis, State establishment in an age of declining culture would naturally lead to the stereotyping of the views embodied in the then standard text-books, with a preference for the less liberal of these. Modern Muhammadans of progressive tendencies complain that such is the character of the Sharai-ul-Islam, as

* Of a totally different character is the numerically small Bohra mercantile community of Ismailis on the Western coast of India, whose personal law has not come much under the notice of Anglo-Indian Courts. See Khojas and Bohras in the Table at p. 91.

† Sir Roland Wilson's reference seems to be to "*Sharāi-ul-Islam*, by Najm-ud-din Jaafar Abul-Qasim, which seems to have been written between A.H. 436 & 676 (between A.D., 1045 and 1278). See Aghnides, Muhammadan Theories &c., p. 186.

contrasted with other Shia works of the school known as Usuli*; though even the former approximate more closely on some points of civil law to the views approved in Western Europe than those of the Sunnis.

Features Common to Shia and Sunni Law-Books.

Widely as they differed in results, the methods of law-making, and the conception of what a law-book should be, were much the same in all sects and schools. For Sunnis and Shias alike, codification, in the modern sense of the term, was out of the question. The Commander of the Faithful among the Sunnis, or the representative of the absent Imam among the Shias, made no pretension to legislative power. He was there not to make law but to execute it; or if he did venture to publish ordinances of his own, they were only like the circulars to magistrates issued from the English Home Office; provisional intimations, subject to correction, as to how the central executive understands the law and wishes to see it applied by the local officers in some specified contingency. Even in modern Turkey such Imperial ordinances are liable to be declared invalid by the Shaikh ul Islam, just as in America a Federal or State law is liable to be declared unconstitutional by the Supreme Court of the United States. The real makers of the law were the professors of sacred learning, the expositors of the Koran, and the collectors of "traditions," who might or might not happen to hold judicial office, in addition to their professorial function. If they did, their books rather than their decrees were considered as settling the law for the future. Moreover, of the law which it was the business of their lives to settle, a large part certainly, and perhaps in their eyes the more important part, had nothing to do with the tribunals, and was never intended to be enforced by the secular arm. Thus the ordinary arrangement of a text-book professing to deal with the entire Shariat is to begin with the five religious duties of a Moslem, *viz.*, Ablutions, Prayer, Alms, Fasting, Pilgrimage, of which only a portion of the third, *viz.*, Obligatory Alms, would be enforced by temporal penalties.†

It must not, however, be supposed that the distinctions which the Muhammadan jurists ignored were therefore non-existent. It would take a little more trouble and observation to discover "positive" law in Baghdad under Harun al Rashid than in London under Edward VII: but that is all. The thief whose hand was cut off knew well enough that the executioner would not have done his part had not the judge so ordered; that the judge who pronounced the sentence held office and derived his mandate from the Caliph; though he probably knew also that the Caliph's instructions to the kazi were not in the form, "if a man steals, cut off his hand," and so on through a long list of commands and sanctions, but "give judgment in all cases according to the law of God (with which you are supposed to be better acquainted than I am)." There was a general command which proceeded from a determinate living individual, receiving habitual obedience and provided with all material appliances for enforcing it; though this command was so very general in its terms as merely to incorporate by reference a great body of law made, or in process of making, by successive generations of jurists, by way of gradual accretion to the original Koranic nucleus.

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* See Ameer Ali, M. L., vol. i, pp. 26, 27.

† See, for instance, the Preliminary Discourse prefixed to Hamilton's Hedaya, p. xxxv.

The jurists, again, did not generally compose their treatises by the order of any Caliph or Sultan, nor primarily to please him. They studied and taught either for fame and influence, or as a duty towards God. Then by discussion in the schools a current of opinion was formed in favour of one teacher as a safer guide than another, or of one rule rather than another ; and naturally both the ruler for the time being in selecting judges, and the judges themselves when appointed, found it easier to swim with this current than against it.

However the result was arrived at, whenever, in any given Islamic country, it became possible to predict with reasonable certainty the decision, not of some particular kazi, but of any regular tribunal before which the case might happen to be brought, upon a large number of disputes of ordinary occurrence, and to predict that such judicial decisions would be not merely pronounced, but actually enforced, then and there we may assert the existence of true " positive law."

Exactly how much of it there was at Baghdad under the Abbassides, or at Ghazni under Sultan Mahmud, or at Cordova under Abdur Rahman III, historians do not inform us ; probably quite as much at the last-mentioned place and time as prevailed on the average in medieval Christendom. There is an interesting passage in Finlay's " History of Greece " (Vol. II, p. 24), in which that very learned and judicious writer attributes the arrested progress of Islam to the superiority of Roman over Muhammadan administration of ordinary civil justice.* The time, however, of which he is speaking is the reign of Leo the Isaurian (716-741 A.D.), corresponding with the latter part of the Omayyad period, when the labours of Abu Hanifa and Malik were only just about to begin, and the " law of the Koran " really was in too undeveloped a condition to impose much restraint on an arbitrary judge, or to afford much assistance to a well-meaning one. A comparison instituted three or four centuries later might have yielded different results. Yet even when the legal literature of Islam had come to rival, if not excel in point of modernity for the age concerned, that of Imperial Rome, its effect must not be measured simply by the degree of consistency that it imparted to the coercive action of the tribunals. Such treatises as the Hedaya or the Sharai ul Islam were intended quite as much to serve the purpose of what a Romanist would call manuals for the confessional, as that of guides to forensic practice. Not that Islam encourages anything in the nature of auricular confession or priestly absolution, but that it is no less the function of a *maulawi* to advise the faithful privately in cases of conscience, which may or may not afford matter for possible litigation, than to answer questions formally pro-

* " So long as Mohammedanism was only placed in competition with the fiscality of the Roman government and the intolerance of the orthodox Church, the Saracens were everywhere victorious, and found everywhere Christian allies in the provinces they invaded. But when anarchy and misfortune had destroyed the fiscal power of the State, and weakened the ecclesiastical power of the clergy, a new point of comparison between the governments of the emperors and the caliphs presents itself to the attention. The question, how justice was administered in the ordinary affairs of life, became of vital interest. The Code of Justinian was compared with that of the Koran. The Courts presided over by judges and bishops were compared with those in which Mohammedan lawyers dispensed justice, and the feelings which arose in the breasts of the subjects of the Byzantine emperors changed the current of events. The torrent of Mohammedan conquest was arrested, and as long as Roman Law was cultivated in the Empire, and administered under proper control in the provinces, the invaders of the Byzantine territory were everywhere unsuccessful. The inhabitants boasted with a just pride that they lived under the systematic rule of the Roman Law, and not under the arbitrary sway of despotic power."

pounded from the Bench. Thus, for instance, if we wish to judge fairly of those portions of the standard text-books which treat of conjugal rights and duties, and which may strike the modern reader as dwelling with unnecessary particularity on indecent details, we should compare them, not with an English treatise on the law of husband and wife, but rather with such a book as that of the Jesuit Sanchez, *de sancto matrimonii sacramento*, and they will not suffer by the comparison.

Another point of agreement among lawyers of all schools is their pious conspiracy of silence as to the non-Islamic sources—Arabian, Roman, Jewish, or Persian—from which many of the rules grafted by tradition were, in all probability, derived. Any one disposed to engage in this curious and difficult branch of historical inquiry would do well to consult in the first instance Von Kremer's "Culturgeschichte des Orients unter den Chalifen," Vol. I, chap. ix, also Goldziher's Influence of Parsiism on Islam, printed in an English translation in C. P. Tiele: Religion of the Iranian People, by G. K. Nariman, and Sheldon Amos, Roman Civil Law, pp. 406-415, on the influence of Roman Law on Moslem Jurisprudence Maulvi Shibh has discussed Sheldon Amos's thesis in his Urdu Life of Abu Hanifa, pp. 222-236. He denies the influence of Roman Law, but his argument suffers from a want of first-hand knowledge of Roman Law and Western history.

Common also to Sunnis and Shia is the early petrifaction of the system, and the consequent reliance for most purposes, at the present day, on works from four to eight centuries old; * as though an English lawyer's library were to begin with Glanvil and end with Coke upon Littleton. Of these treatises those most frequently cited in the courts of British India will be noticed presently; for others, reference should be made to Morley's Digest, to the Introductions to Vols. I and II of Ameer Ali's Mahommedan Law, to the Tagore Lectures of 1873 and 1874, or to Mr. Justice Abdur Rahim's Muhammadan Jurisprudence, Chapter III, or to the carefully classified and dated list given in the full Bibliography attached to Aghnides, Mohammedan Theories of Finance, with Introduction to Mohammedan Law.

* The Fatawa Alamgiri, to be noticed presently, is only two and a half centuries old; but it is entirely made up of extracts from other works of the age above stated.



V.

MUHAMMADAN LAW IN INDIA UNDER MUHAMMADAN RULERS.

THE particular forms of Islamic faith and practice now prevalent in India are naturally those followed by the bulk of the original immigrants. The first Arab conquerors of Sindh came from Mesopotamia, which was the cradle of the Hanafi school. Mahmud of Ghazni, who was the first to penetrate the Gangetic valley, and far into the interior of India, was a Persian-speaking Turk, and the Turks generally, whether Seljukian or Osmanli, were Sunnis of the Hanafi school. He was also a nominal vassal of the Caliph of Baghdad, who belonged to that persuasion. By the time that the Muhammadan conquest of Hindustan was completed, Hanbalism and Shafeism had ceased to count for much in the great law-schools of Khorasan and Transoxiana, which would be the chief recruiting-ground for the *ulama* of Muhammadan India. The real struggle in those regions was thenceforth between Hanafis and Shias, and in this India was not uninterested. Babar, the founder of the Mogul dynasty, was at one time allied with the first Shia king of Persia. His son, Humayun, when driven out of India, sought refuge at the Court of Persia with the successor of Ismail Safavi, and was believed to have there given some sort of pledge to patronise the Shia faith in the event of his reconquering Hindustan. Nothing came of that; but among the favourite officers of Akbar there was at least one Shia (a descendant of the 8th Imam), and two of the Muhammadan kingdoms in the Deccan were ruled at intervals by Shia princes. One of the three brothers who disputed the succession with Aurangzib was a Shia, and from the middle of the eighteenth to the middle of the nineteenth century the hereditary Nawab Viziers (afterwards kings) of Oudh were of that persuasion. It was only, however, during the last nine years of that dynasty's existence that Wajid Ali Shah ventured so far to defy orthodox opinion as to appoint a Shia mufti, and to ordain that cases in which either litigant was a Shia should be decided according to Shia Law. Since the British annexation, the application of Sunni or Shia Law has depended upon the more impartial, if somewhat vague, rule stated in s. 11 of this Digest.

The transplanting of Muhammadan Law from Central Asia to Hindustan, from a country in which the religion connected with it was professed almost universally to a country in which it was that of a small but dominant minority, might have been expected to modify the working of the system and to some extent actually did so. The rules laid down for the treatment of non-Moslem subjects (*zimmis*) could not be applied in their entirety. The capitation tax *jizya* was inseparable from the status of a *zimmi*, just as the *zakat* was due from a Moslem. As a matter of fact, it was rather the exception than the rule for the *jizya* to be exacted, and a tax on pilgrimages was the furthest stretch of systematic interference with

Hindu worship. So, too, their domestic affairs—marriages, adoptions, inheritances, and so forth—continued to be regulated by their own spiritual guides in accordance with their own sacred books, and were seldom, if ever, brought before a Muhammadan kazi. On the other hand, the conquerors naturally kept in their own hands the administration of the criminal law, ignoring wholly, and not undeservedly, the still cruder laws of Manu on that subject. But the Muhammadan Sacred Law itself provided for the exemption of tributary infidels from some of its penalties, while expressly declaring them amenable to others.

There was not quite the same necessity for uniformity in the law of contract, but Mr. Baillie, at all events, thinks that the same tribunals did, in fact, decide in much the same way disputes arising out of sales (and other contracts ?), whether the parties happened to be both Hindus, or both Muhammadans, or one a Hindu and the other a Muhammadan.

Lastly, as regards the ownership or tenure of land, it has been a matter of keen debate ever since the time of Sir William Jones how far the actual arrangements of the Mogul period were derived from Hindu usage, and how far from Muhammadan Law ; here it is sufficient to note that, whatever they were, and whencesoever derived, they were applied to all landholders irrespective of religion. It is now generally acknowledged that the framework of the Muhammadan land tax system in India was built up on the principles of Muhammadan law, modified by a recognition of local customs.

We are more concerned to inquire how far the Indian Moslems themselves were compelled to observe, or did in fact observe, the rules of the Shariat as set forth in the standard Hanafi treatises. On this point our information is confessedly defective ; but evidently the great numerical preponderance of unbelievers, and the absolute necessity for employing Hindus in many branches of the public service, must have made it easier than elsewhere for a strong-minded Sultan to disregard the scruples of his stricter co-religionists when they happened to conflict with his views of public policy ; and several are expressly mentioned as having done so before the great Akbar, who in his later years went the length of introducing a new form of religion. This audacious proceeding actually cost him the life of his chief adviser, and very nearly cost him his throne also, in spite of his immense personal prestige and popularity, and the formal re-establishment of Orthodox Islam as the State religion followed as a matter of course on his death ; but it was not till the reign of his great grandson that the Government set itself seriously to enforce the Shariat in its entirety, and in few, if any, of the fragments into which the Empire subsequently broke up was the attempt persevered with. Thus it was proved in 1870, to the satisfaction of the Calcutta High Court,* that for a considerable time prior to the establishment of British rule the civil tribunals of Bengal had been in the habit of recognising loans at interest by Muhammadans as well as Hindus, though clearly prohibited by the Sacred Law of the former, and scrupulously avoided by the more devout.

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* *Mia Khan* v. *Bibi Jap*, 5 B. L. R., 500.

VI.

MUHAMMADAN LAW UNDER BRITISH RULE.

THE foundations of British India were laid by treaties with Muhammadan rulers representing the authority of the Delhi Empire. Bengal, Bahar, the so-called North-West Provinces, and the Carnatic were ceded to us under more or less compulsion by Muhammadan potentates, nominally viceroys of the Mogul Emperor, and were governed by the East India Company down to 1857 in the name of that titular sovereign, who had long been in fact a British pensioner. Moreover, the assumption of even this delegated authority did not take place all at once. The *farman* of 1765 purported to vest in the Company only the *diwani* (collection of revenue and civil jurisdiction); the administration of criminal justice remained for many years ostensibly in the hands of the Nawab Nazim of Bengal, and the Nizamat Adalat, or Chief Criminal Court, sat not at Calcutta but at Murshidabad, the native capital. The *farman* itself, in its original form, bound the Company to decide causes "agreeably to the rules of Mahomet and the laws of the empire," and though this clause disappeared from later versions of the treaty, the spirit of it continued for a long time to influence the policy of the Company and the expectations of the people. Understaffed, and chiefly pre-occupied with the collection of revenue, they were disposed to follow in legal matters the line of least resistance; and keeping things as they were, meant administering the Muhammadan Law, except where the practice of the Muhammadans themselves had been to leave disputes between Hindus to be determined according to their own Shastras as interpreted by Hindu Pandits. Hence the famous Regulation II of 1772, by s. 27 of which it was enacted that "in all suits regarding inheritance, succession, marriage, and caste, and other religious usages or institutions, the laws of the Koran with respect to Mahammedans, and those of the Shasters with respect to Gentoos [Hindus], shall be invariably adhered to." Outside these specially reserved topics, the scheme of Warren Hastings afforded no general indication of the law to be applied by the Courts under the Company's control, beyond the fact that Muhammadan law officers were attached to all of them, original and appellate, civil and criminal, to advise on questions of law. Criminal proceedings in particular were assumed to be governed by the Shariat (irrespective of the religion of the offender) unless and until the Company's Government should think fit to order otherwise.* Not till 1790 was this jurisdiction withdrawn from the Nazim; and although from that date the system was gradually Anglicised by successive Regulations, the Muhammadan element did not entirely disappear till 1862, when the Penal Code and the first Code of Criminal Procedure came into force, nor as regards rules of evidence till the passing of the Indian Evidence Act in 1872.

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* The rigour with which this principle was carried out, and the extreme reluctance of the Government to interfere with native usage, is strikingly illustrated by the following

Returning to the branches of law which more directly concern us the Company's Regulations of 1772 were immediately followed, and to some extent interfered with, by the Act of Parliament known as the Regulating Act of 1773, and the corresponding Royal Charter, which established at Calcutta a Supreme Court, manned by barrister-judges holding their commissions from the Crown, who were invested (*a*) with criminal and civil jurisdiction over all persons in Calcutta, and (*b*) with civil jurisdiction over all persons in the service of the East India Company throughout its newly acquired territories. The distinction between (*a*) and (*b*) needs a word of explanation.

The town of Calcutta had been from its foundation (1690) an English colony, governed by English Law. True, the site was merely rented from the Mogul Government, whose authority was at that time undisputed and effective; but it had always been usual with Muhammadan rulers, as far back as the time of the Crusades, to gain revenue and save themselves trouble by permitting responsible bodies of foreign merchants, under treaty with their respective governments, and for a sufficient money consideration, to govern themselves according to their own laws in the localities assigned for their exclusive occupation. Such had been the "capitulations" that protected the Venetian and Genoese settlements at Constantinople while the Ottoman power was at its height; the only

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letter, addressed in 1781 by the Collector of Islamabad to the officer commanding the Company's troops at Chittagong :—

"SIR,

"Agreeable to a *derkaste* (application) delivered in to me by Mahomed Summee, Darogah of the Nizamut Adawlut, I have to request you will grant him a party sufficiently strong to assist him in carrying into execution the Fetwahs of the Nazim upon Mahommed Shuffee, Mahd. Rustum, Ameer Mahommed, and Loodee, Decoits, who are to suffer Impalement, and I beg leave to acquaint you that for the sake of example the Darogah proposes to have the sentence executed in four different divisions of the province, viz. at the Finny, Soorporah, Muriaserai, and Jugecollah.

"I am, sir,

"Your most obedient humble servant,

"JOHN BULLER."

"Islamabad, the 12*th Oct.*, 1781."

There is no hint here of any doubt as to the propriety of the sentence, or of any reference to headquarters; and this is explained by an earlier correspondence (1773—74) preserved in the archives of the same Collectorate, from which it appears that the then Collector did stay execution of certain sentences until the pleasure of the Governor and Council could be known, apparently from scruples as to the mode of punishment; and that the reply (addressed to his successor) was as follows :—

"The officers of the Nizamut have again declared the propriety of the sentence, and that it is strictly [conformable [1]] to the Mahomedan Law. As the natives are not to be tried according to our notions of justice, but by the established law of the country, *excepting in very extraordinary cases where it has been usual for Government to interpose*, I must request that you will permit the officers appointed for that purpose to carry the enclosed warrant into immediate execution.

"I am, sir, your most obedient humble servant,

"WARREN HASTINGS."

"Fort William, the 11*th July*, 1774."

The clause here italicised is in Hastings' own handwriting.

A list of the sentences is appended, showing that two of the offenders (dacoits) were to have the right hand and left foot cut off. In four other cases the sentence is death, but the mode of execution is not stated.

[1] MS. torn here.

difference being that the self-reliant British traders made their own arrangements with the local authorities without the intervention of their Home Government, trusting more to the enlightened self-interest of the former than to warlike demonstrations on the part of the latter, though these also had been employed at least once with good effect. The result was, from a juridical point of view, much the same as if they had settled in an uninhabited country ; namely, that the first settlers were understood to have carried with them the English common and statute law, *so far as applicable to their circumstances*,* but not to be affected by Acts of Parliament subsequent to the settlement unless expressly extended to them. The early Charters empowered the Governor and Council of each settlement to exercise civil and criminal jurisdiction therein, according to the laws of England ; and Charters of 1726 and 1753 provided, at least on paper, for more regular tribunals at each of the principal settlements in the shape of a Mayor's Court for civil, and Courts of " Oyer and Terminer " and Quarter Session for criminal proceedings ; the two latter, however, consisting simply of the Governor and Council. In all these Charters it was assumed that the law to be administered was too well known to need description ; in reality, these amateur judges and magistrates knew scarcely more of English than of Native Law, but had sufficient common sense to maintain a tolerable state of peace among the servants of the Company, who formed practically the whole European population, and to attract within the local limits of their jurisdiction, by comparative peace and safety, a steadily increasing native community. These last were understood to have voluntarily placed themselves under English Law by coming into the settlement, but the Charter of 1753 directed that suits between Indian natives should be determined among themselves, unless both parties agreed to submit them to the Mayor's Courts.

The sharp line thus drawn for legal purposes between the Presidency Towns and the Mufassal † was temporarily obscured by the Regulating Act of 1773, which extended the civil jurisdiction of the new Supreme Court to all claims against " British subjects " or persons in the service of the Company ; but it was again strongly emphasised by the Act and Charter of 1781, which placed the Company's Courts on a secure footing and left the laws to be administered therein, and the procedure thereof, to be defined from time to time by Regulations of the Governor-General in Council, while the Mufassal jurisdiction of the Supreme Court was limited to complaints against, or disputes between, " British subjects "—a term ultimately restricted by interpretation to those who are now distinguished as " European British subjects." Within the town of Calcutta it remained as under the former Act, exclusive and unlimited, over natives as well as Europeans ; and it thus rested with Parliament, not with the Company's Government, to define the extent to which native law and usage should thenceforth be recognised. For the fact that this important problem received different solutions inside and outside the Maratha ditch, I can suggest no better explanation‡ than the factious temper of the time,

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* See as to these words, and also as to the general principle, *Freeman* v. *Fairlie*, 1 Moo. Ind. Ap. 305 (1828), at p. 324.

† *Mufassal*, corruptly Mofussil, separate, distinct, particular ; in Hindustan a subordinate or separate district ; its most usual application in Bengal is to the country in general as distinct from Calcutta.—" Wilson's Glossary."

‡ I have left this and the two following paragraphs as Sir Roland Wilson wrote them It is to be noted, however, that the " native " inhabitants of Calcutta were in those days

which might indispose the draftsman, whoever he was, of the Act and Charter to take counsel with Warren Hastings, the author of the Regulations above quoted, or to copy his work exactly, even where no difference of principle was involved. That there should be more English and less native law for those natives who had chosen to fix their abode within the original English settlement would have been at least an intelligible policy; but it is difficult to attribute to anything but ignorance an arrangement by which one large branch of Muhammadan Law was expressly recognised in Calcutta but not in the Mufassal, while in regard to two other large branches of law the difference was the other way.

By s. 17 of the Act it is enacted that in disputes between the native inhabitants of Calcutta "their inheritance to lands, rents, and goods, *and all matters of contract and dealing between party and party*, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos * by the laws and usages of Gentoos; and where only one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant." Comparing this with the Regulations above quoted, we see that it agrees only in respect of inheritance, and differs (1) by omitting "marriage" and "other religious institutions," and (2) by adding the words here italicised; thus ignoring native laws in the very points on which such treatment would be most offensive and least necessary in the interests of public order, and preserving them in respect of that branch of civil law into which religious differences enter least, and in which uniformity is most desirable. It was argued in one case that the word "contract" would cover "marriage," and therefore that a Muhammadan husband resident in Calcutta could not avail himself of the action for damages against an adulterer which was allowed at that time by the English Common Law; but the Supreme Court would have none of it [*Soodasim Sain* v. *Lockenauth Mullick*, Morton's Reports, 107 (1839)]. Yet, while deciding for the plaintiff, the same Court repudiated equally the argument used on his behalf, that the English remedy must be applicable because the Muhammadan Law provided no civil sanction in such cases, and the criminal sanction which it did provide had been taken away by English Law, which provided no punishment for adultery. On the other hand, every Muhammadan or Hindu bigamist was amenable according to the letter of the Statute to the English penalties for that offence, unless he could bring himself under the clumsily worded exception of s. 18.

> "In order that regard should be had to the civil and religious usages of the said natives, the rights and authorities of fathers of families and masters of

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a purely migratory population. They came there for purposes of business, but had their real homes in the Mufassal. Even the latest census returns show in the Presidency Towns a large preponderance of the male over the female population, and other features which indicate that the home of the great bulk of Indians in Calcuttta or Bombay is elsewhere. This would go some way towards explaining the difference in the laws to be applied to Indians in Calcutta and the Mufassal from 1773 onwards. As regards inheritance, the two were on a par. As regards contract and "dealing between party and party," these would refer to commercial law of the more modern kind, which is of most importance in Presidency Towns, and in which the Indians had developed their own usages (not necessarily religious). As regards marriage and other religious institutions, the Indians celebrated them mostly in their homes outside the Presidency Towns. Probably the word "caste" as used loosely by English draftsmen included the religious and family usages of Muhammadans as well of Hindus; note the wording of s. 18 of the Act of 1773.—A. G. A.

* *I.e.* Hindus; derived from the Portuguese *Gentio*, a Gentile or heathen.

> families, according as the same might have been exercised by the Gentoo or Mahomedan Law, shall be preserved to them respectively within their said families ; nor shall any acts done in consequence of the rule and law of caste, respecting the said families only, be held and adjudged a crime, although the same may not be held justifiable by the laws of England."

Inasmuch as Muhammadans have no caste, the latter part of the section would not help them ; nor does it seem quite natural to include polygamy among the rights and authorities of fathers and masters of families.

Meanwhile, as we have seen, the Muhammadan Criminal Law, modified from time to time by the Company's Regulations, governed not only Muhammadans but the entire native population outside the Maratha ditch. Matrimonial disputes were dealt with according to the law of the Koran or the Shasters, as the case might be ; while " matters of contract and dealing between party and party " were left to be determined according to the fancy of the judge, which it became the fashion to describe as " justice, equity, and good conscience ; " unless indeed he were able to convince himself that any particular kind of contract, or that contracts in general, might be covered by the words " other religious institutions." From the Muhammadan point of view the law of contract was just as much, or as little, a religious institution as the law of marriage or the law of inheritance, and, in fact, marriage is treated in the law books as a species of contract ; but that was evidently not the point of view from which the Regulation was framed. Needless to say, prosecutions of Muhammadan inhabitants of Calcutta for bigamy were unheard of in practice. On the other hand, the extreme paucity of reported rulings of the Supreme Court bearing on questions of Muhammadan Family Law, as compared with those of the Sudder Dewanny Adawlut, is probably attributable, at least in part, to the peculiar wording of the Act, making it difficult for the former tribunal to afford appropriate redress, and thus forcing would-be litigants to settle their differences in some way or other out of Court.

It is not a little singular that these two enactments, both framed with little experience in the infancy of British rule, and dealing with the same subject-matter and the same classes of persons in such widely different fashions, should have survived side by side, without any attempt at fusion or assimilation, through more than a century. Although one Chartered High Court now takes the place of the Supreme Court and the Sudder Courts, the jurisdiction which it inherits from the former is still carefully distinguished from that derived from the latter, and the Charter provides that the law or equity to be applied in the exercise of its original civil jurisdiction shall be that which would have been applied by the Supreme Court, so that we are referred back, as regards the native laws, to ss. 17 and 18 of the 21 Geo. III, c. 70.

Warren Hastings' Mufassal Regulation of 1772, more formally re-enacted as s. 27 of Regulation of 1780, was embodied, with the addition of the word " succession," in Impey's Revised Code of 1781. This, in turn, was superseded by s. 15 of Regulation IV of 1793, which enacted that " in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which the judges are to form their decision." By Regulation VII of 1832, an attempt was made to define

more precisely the parties between whom the last-mentioned Regulation should be applicable, by providing that

> "Whenever, in any civil suit, the parties shall be of different persuasions, when one party shall be of the Hindoo and the other of the Mahomedan persuasion, or where one or more of the parties to such suit shall not be either of the Mahomedan or of the Hindoo persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity, and good conscience; it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles."

All this verbiage merely amounted to saying that, by the word "parties" in the original Regulation must be understood "both parties," which was, of course, grammatically correct; and that as to what rule should be followed when the parties happened to be of different persuasions the legislator's mind was a blank, and the judges would have to make their own law as they went along, until the gradual accumulation of precedents should have laid a firm foundation for a code. The Indian Legislature has now expressed this more plainly and succinctly in what was s. 24 of the Bengal Civil Courts Act, 1871, and is now s. 37 of Act XII of 1887*, while retaining the original phrase, "when the parties are Muhammadans," without the gloss of 1832, and without attempting any other explanation. A literal interpretation of the clause is, however, capable of producing, in some cases, very inconvenient, and certainly unintended, results; as where, for instance, the title of a Hindu or Christian purchaser depends on the question whether the vendor was or was not entitled to the property as heir of a deceased Muhammadan. Cases of this kind have actually come before the High Courts on their original civil side, requiring therefore to be solved with reference to "the law of the defendant" as prescribed by the 21 Geo. III, c. 70; and in those cases the Courts have, as we shall see†, uniformly treated it as referring, not to the defendant in the suit as actually instituted, but to the person who would naturally have been defendant if the question of law had been litigated immediately on the occurrence of the facts which gave rise to it.

The minor Presidencies followed in the wake of Bengal, both as regards the separate treatment of Presidency Town and Mufassal, and as regards the wording of the Act of Parliament defining the range of native laws in the former. Moreover, the regulations, and the subsequent Acts of the Indian Legislature, for the Madras Mufassal were on this point modelled very closely on those of Bengal; the enactment now in force, s. 16 of Act III of 1873, differs from s. 37 of the Bengal, N. W. P., and Assam Civil Courts Act only by providing two alternatives instead of one for the case in which the parties should happen not to be both Hindu or both Muhammadan; namely, that "(*b*) any custom (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision, unless such law or custom has by legislative enactment been altered or abolished," and that only "(*c*) in cases where no specific rule exists," shall the Court, as in Bengal, "act according to justice, equity

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* See s. 1 of this Digest.

† See under ss. 3 and 11 of the Digest.

and good conscience." The Muhammadan Criminal Law also received the same initial recognition, and underwent the same gradual modification and extinction. In the Bombay Presidency, however, matters followed a somewhat different course, legislatively as well as politically.

Anglo-Muhammadan Law in Western India.

Our immediate predecessor in that quarter was *de facto* not a Muhammadan but a Hindu Government * ; consequently we did not find the Muhammadan Law, either criminal or civil, acknowledged as in any sense the general territorial law of the territories acquired by us in 1818. In the very small Mufassal held by the East India Company prior to that date, the singular plan seems to have been followed of trying and sentencing each accused party according to his own personal law ; Hindus by Hindu Law, as gathered from Halhed's Gentoo Code, Muhammandans by the Muhammadan Criminal Law, as gathered from Hamilton's Hedaya and the *fatwas* of the law officers, Christians and Parsis by the English Law.† But the first Governor of the enlarged Presidency was the enlightened Mounstuart Elphinstone, who left behind him, in the Regulations of 1827, a complete, though rough-and-ready, Code of Civil and Criminal Law. In the criminal branch of this Code, which remained in force until superseded by the Indian Penal Code (1860), the principle of personal law was restricted to cases in which the religious law of the individual charged provided some punishment (not in itself objectionable) for an act not made punishable by the Code, but which might be regarded as a breach of morality of social order. The civil part of the Code contained the following provision, which is still in force and more directly concerns us :—

> "The law to be observed in the trial of suits shall be, Acts of Parliament and Regulations of Government applicable to the case ;
>
> in the absence of such Acts and Regulations, the usage of the country in which the suit arose ;
>
> *if none such appears, the law of the defendant,* and in the absence of specific law and usage, justice, equity, and good conscience alone."

It will be noticed that this clause does not, like the enactments in force in other parts of India, specify any particular matters as to which the native laws are to supply the rule of decision ; but naturally inheritance and marriage (and in the case of Hindus caste, adoption, and the joint family system) have been in point of fact the subjects with which British legislation has most rarely interfered.

Another peculiarity of this Regulation is the absence of any express mention of Hindu or Muhammadan Law. By the " law of the defendant " must of course be meant some body of systematic personal law, as opposed to mere family or caste usage on the one hand, and to the general law of the land on the other ; but it will cover apparently Parsi, Jaina, Jewish, or Buddhist Law, as well as the systems based on the Koran and the Shasters ; subject, however, to the important condition (constituting a third peculiarity of this remarkable enactment) that it is only to be resorted to, whatever may be the nature of the dispute, failing proof of " the usage of the country in which the suit arose." In thus giving precedence to local

* Except as to the Island of Bombay, received from the Portuguese.

† Morley, Introd. clxxxvi.

usage over the sacred laws of the two great religions, Elphinstone anticipated the policy afterwards pursued in the Panjab.

The statutory footing of the native laws in the Presidency town of Bombay is exactly the same as in Madras, and differs from their treatment in Calcutta only by the insertion of words indicating that it might have been in certain cases the established practice of the native Courts not to apply strictly the religious law of the parties, and that in such cases the old practice was not to be disturbed.* But the application of the rule to the Muhammadan population brought to light a rather curious state of things.

The Khoja and Memon Cases.

In 1847 the Supreme Court of Bombay was called upon to deal with the claim of a *soi-disant* Muhammadan woman, to take in conjunction with her infant sister the two-thirds of her father's estate which is allotted by the Koran to daughters when there are no sons. The answer to the claim was that all parties to the suit belonged to a sect or caste of Muhammadans called Khojas, who had preserved from time immemorial certain customs differing from those of Muhammadans generally, and one of these customs was that females were not entitled to any share in their father's estate, but only to the expenses of their marriage, and to maintenance until marriage. Inquiry showed that according to their own traditions these Khojas had been converted from Hinduism about four hundred years ago; that their dress, appearance, and manners were still for the most part Hindu; that they were settled principally among Hindu communities, especially in Bombay, where they numbered about two thousand souls; that though they called themselves Mussulmans, they possessed no translation of the Koran in either of the vernaculars used by them, and there was not a single man among them acquainted with either Arabic or Persian. The only religious work current among them was one in the Cutchi language, the nature of which was more accurately ascertained in a later case to be presently mentioned, but from which extracts were read on this occasion, showing, at all events, a strange combination of Hindu with Muhammadan tenets. The chief living object of their reverence was the Agha Khan, whose title to the position the Court supposed to be based on descent from the Pir (saint) who had converted them.

A suit raising precisely the same issue came at the same time before the same Court between members of the sect known as Cutchi Memons, whose history was similar as regards their ancient conversion from Hinduism, but who were said to be superior to the Khojas in wealth, numbers, and learning, and to be more closely connected with the general body of Mussulmans.

The judgment of Sir Erskine Perry was that in both cases the alleged custom had been proved, and that it must be allowed to prevail notwithstanding its divergence from the Muhammadan Law. Quoting the Act of Parliament and Charter as above, the learned judge said:—

> "If the meaning of this clause is that it is an absolute enactment or adoption of the Koran as of a positive unchangeable law, without regard to what the usages of India, whether Shia, Sunniy,† or sectarian, might have been,

* See Digest, s. 3.

† *Sic.* in the Report.

undoubtedly the customs set up in conflict with the text of the Koran cannot be sustained. But I think it is quite clear that the clause in question was framed solely on political views, and without any reference to orthodoxy or the purity of any particular religious belief. It was believed erroneously that the population of India might be classified under the two great heads of Muhammadan and Gentoo; and the use of the latter term as *nomen generalissimum*, which is unknown, by-the-by, in any Eastern tongue, or even in colloquial use, except in the Presidency of Madras, shows that the main object was to retain to the whole people lately conquered their ancient usages and laws, on the principle of *uti possidetis*. It may be questioned whether one individual in the Legislature —with the exception, perhaps, of Mr. Burke—was aware of the sectarian differences which distinguished Shia from Sunniy; and not even that great man, we may be assured, was at all conscious that there were millions of inhabitants in India, such as Sikhs, Jains, Parsis, Hebrews, and others, who had nothing, or next to nothing, in common with Brahminical worship. But the policy which led to this clause proceeded upon the broad, easily recognisable basis of allowing the newly conquered people to retain their domestic usages." . . . "I am, therefore, clearly of opinion that the effect of the clause in the Charter is not to adopt the text of the Koran as law, any further than it has been adopted in the laws and usages of the Muhammadans who came under our sway; and if any class of Muhammadans, Muhammadan dissenters as they may be called, are found to be in possession of any usage which is otherwise valid as a legal custom, and which does not conflict with any express law of the English Government, they are just as much entitled to the protection of this clause as the most orthodox society which can come before the Court."

Sir Erskine Perry's decision failed to bring peace to either of the communities concerned. As regards the Khojas, the defeated side was that favoured by the Agha Khan. Excommunications and even murders followed, and the Agha was thought to have shown undue sympathy with the murderers who were hanged. A sort of extra-judicial intervention of Sir E. Perry secured a ten years' truce, but in 1861 the feud was renewed, the dispute being no longer as to the observance of Hindu rules of succession, but as to whether the Khojas, in so far as they were Moslems at all, were to be considered orthodox Sunnis or Ismailian Shias. In 1866 this question came before the Court in the great case of *The Advocate-General of Bombay, ex relatione Daya Muhammad and others* v. *Muhammad Husen Huseni and others*, commonly known as the Agha Khan case, the hearing of which had occupied twenty-four days before Arnould, J., delivered his celebrated judgment. The evidence as summed up by him cleared up much that had been dark to Sir E. Perry. According to the story now unfolded, the Agha Khan, the head of the Khoja community, was not a descendant of the Pir Sadr Din,* who had converted their ancestors from Hinduism, but of his distant principal, the redoubtable chief of that Eastern branch of Ismailian Shias, known to European historians as the sect of Assassins. Sadr Din was one of the numerous Dais, or missionaries, sent out during the twelfth and thirteenth centuries from the castle of Alamut in Northern Persia, or from wherever the chief might happen to be concealed after the destruction of that fortress. The method regularly pursued by these proselytising agents was first to gain attention by professing agreement with the distinctive tenets of the person addressed, and then gradually to lead him on to the view that these tenets needed to be supplemented by fuller knowledge, which could only be obtained by faith

* *Sic.* in the Report, 12 Bom. H. C. 323; the name was probably so pronounced by the Khojas, though its correct transliteration from the Arabic would be *Sadruddin* (centre of the Faith).

in the "Concealed Imam," the legitimate representative of Ali, the vicegerent of the Prophet of God.

Thus was explained the structure of the Dasavatar ("the Ten Incarnations"), the one religious book of the Khojas. The first nine chapters humoured the preconceptions of the Hindus by describing nine successive incarnations of Vishnu, and then the tenth related his incarnation in "the most Holy Ali." And inasmuch as the Shia code of ethics, differing from that of the Sunnis, expressly sanctioned the temporary concealment of beliefs which could not be avowed with safety, it was easy to understand the adoption or retention of some Hindu usages where Hinduism happened to be dominant, and, on the other hand, the practice (which the Agha Khan was now anxious to suppress) of celebrating their marriages in the Sunni form before the Sunni Kazi in Bombay, where a competent Shia registrar might not be easily found.

The conclusive proof (so the learned judge considered) of the real character of the body was that, while there was hardly an instance of a Khoja undertaking the pilgrimage to Mecca, they appeared to have been very much in the habit of visiting the tomb of Husain at Kerbela, and also, before the Agha Khan came to reside in British India, of undertaking a much more expensive and difficult journey merely in order to pay their respects to him or his predecessor in a remote district of Persia.

The result of the suit, on which the control of all the public property of the sect depended, was altogether favourable to the Agha Khan. Instead of the privileges of membership being declared to belong exclusively to Sunnis according to the prayer of the plaintiffs, exactly the reverse was decided; namely, that, even if it had happened to be the fact (which it was not) that the majority for the time being had become attached to Sunni principles, the management would still remain exclusively with those adhering to the doctrines of Ismailian Shias, and therefore practically with the Agha, by whose agents all fees and offerings were collected.

The decision of 1866 was even less calculated than that of 1847 to bring about a condition of stable equilibrium. The former merely established that, whatever their general personal law might be, the Khojas were Hindus in respect of one particular rule of succession. The latter laid down that, in so far as they were Muhammadans at all, they represented "the dissidence of dissent" in its most extreme form; the Ismailiyas being dissenters from the main body of Shias, as these in turn are dissenters from the main body of orthodox Islam. The dissidence may even be carried one step further, because two distinct bodies of Ismailian Shias are represented in India, and these followers of the Agha Khan seem to be a rather more eccentric variety than the Bohras of Bombay, a peaceful and prosperous trading community representing those Western Ismailiyas, who formerly owned allegiance to the Fatimite Caliphs of Egypt. It does not appear, however, that there is, or ever was, any special system of Ismailian law; and at all events on the few matters with which the Courts of British India are concerned, it is probably safe to assume (with Ameer Ali) that the Bohras are governed, unless the contrary be clearly shwn, by the general Shia Law as expounded in the Asna-Asharya text-books; and the Khojas also, in so far as they are not governed by the Hindu Law, or their own special customs. As to this, subsequent decisions established that Hindu Law was to supply the rule of decision for Khojas, not merely on the one point of exclusion of females, but on all questions of inheritance

and succession, unless strict proof were given of a different custom ; thus opening the way to further puzzles as to which of the various systems of Hindu Law was the one to which the original Khojas must be supposed to have conformed.* The legal presumption was not, however, extended to marriage, it having been held, for instance, that a Khoja has the Muhammadan privilege of divorcing his wife (which is not allowed to Hindus), though it is usual, and perhaps necessary, to obtain the consent of the *jamat* (general assembly) before doing so ; *In re Kasam Pirbhai*, 8 Bom. H. C. R., Cr. 95 (1871). In the same case it appeared incidentally that, on a former occasion, the consent of the *jamat* had been asked even for the taking of a second wife without divorcing the first, which is not required by either Hindu or Muhammadan Law. The natural way out of these perplexities was to seek the intervention of the Legislature, and a suggestion to that effect was thrown out by the Bombay High Court in 1875.

> "It is manifest (said Sir M. Westropp) that such a state of the law must greatly encourage litigation, and we cannot help thinking it wou.d be most desirable that the Government should take steps, as was done in the case of the Parsis, to ascertain the views of the majority of the community on the subject of succession, and should then pass an enactment giving effect to those views. Unanimity, of course, could not be expected, but the rules which were found generally to prevail might be made law, and though the religious differences existing among members of the Khoja caste might create some difficulty, it would not, I think, be insuperable."

By way of testing the practicability of this suggestion, a Commission was appointed, consisting of the Chief Justice of Bombay and one other European, of H. H. Agha Ali Shah, son and successor of the above-mentioned Agha Khan, of three Khojas belonging to his party, and of one Sunni Khoja. This Commission managed to agree on a draft Bill, subject to dissent on certain points by the Agha and one of the Shia members, which received the approval of the Government of Bombay, but which the Government of India did not see its way to adopt. Ultimately a Bill, differing in some important respects from that of the Commission, was introduced into the Legislative Council of India as "The Khoja Succession Act, 1884," but never passed beyond the Committee stage. The real hitch seems to have been not so much the difficulty of ascertaining what the majority of the Khojas desired, or dread of offending the minority, as reluctance, based on grounds of sentiment or public policy, to gratify the leaders of both the rival sections on points about which they were nearly, if not quite, unanimous. For one thing, all the Khoja members were unanimous in wanting to penalise marriages outside the caste by refusing rights of succession to non-Khoja widows, and most of them wished also to disinherit children by a non-Khoja wife, while they were precluded from directly denying the validity of such marriages by the fact that Khoja marriages had always, as we have seen, been solemnised and registered as Muhammadan marriages before the Kazi of Bombay, and Muhammadan Law knows nothing of caste endogamy. The Government would have nothing to do with any scheme for placing new legislative restrictions on mixed marriages, and framed their clause dealing with the successional rights of widows and children in such a way as to leave this burning question to the arbitrament of the Courts.

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* See 13 Bom., 536. And as to gifts, a topic rather closely connected with wills, and so with succession, it was intimated by Tyabji, J., in a recent case, that he knew of no authority for applying the Hindu Law on that subject to Khojas, and was not disposed to create any. *Moosabhai*, 29 Bom., 267 (1904).

Then, again, a question had been raised in the Courts, but not decided, as to the right of the *jamat* (which in the Shia section of the body meant practically the Agha) to take property by escheat where the deceased had left no near relations. The Agha and his friends would naturally have liked to see the affirmative view of this question sanctioned by the Legislature ; but the Government did not see its way to presenting that dignitary with so large an unearned income, and proposed by their Bill to give a chance of succession to all relations, paternal or maternal, however remote, and failing these to reserve the usual escheat to itself.

Hence the deadlock, the only solution offered by the Government being one not calculated to please any section of the community concerned.

In the recent Khoja case, *Rashid Karmali* v. *Sherbanoo*, 29 Bom., 85 (1904), although a Khoja and his wife are married as Muhammadans, he is considered to have died a Hindu as far as her rights are concerned. Hence, if he lived in coparcenership with his brothers and left no children, his share of the joint estate passed to them by survivorship, subject only to the widow's claim for maintenance. Subsequently, on review of judgment in the same suit, the Muhammadan Law was again resorted to in order to determine whether the wife had been validly divorced ; 31 Bom., 264 (1907). In *Jan Mahomed*, 38 Bom., 449 (1913), the principle was laid down that the Khojas were governed, in succession and inheritance, by Hindu law " as applied to separate and self-acquired property "; otherwise the general presumption was they were governed by Muhammadan law and usage.

The legal adventures of the Memon community were less varied and exciting ; but after more than thirty years' acquiescence in the view that they were governed by Hindu rules of inheritance, they also began to be affected by prickings of conscience as to this deviation from Koranic precepts ; and in *Mahomed Sidick* v. *Haji Ahmed*, 10 Bom., 1 (1885), Scott, J., had his attention drawn to the fact that at a recent meeting of the community a petition had been drawn up and forwarded to the Government, praying that the Muhammadan Law might in future be employed. " It is pretty clear (said the learned judge) that a large and influential section of the community, in fact, the great majority, wish to follow in future the law of their religion. A good case is thus made out for the consideration of the Legislature, but none whatever for the interference of a Court of Law." In this case, as in that of the Khojas, the Legislature did " consider " the matter in the shape of a purely permissive Bill, introduced by the Hon. Syed Ameer Ali, and was still " considering " when that gentleman ceased to sit in the Legislative Council of India, after which no trace of it is to be found. It has been held, however, in a recent Privy Council case, *per* Viscount Haldane, that where Memons migrate from India to Mombasa and settle among Muhammadans there, the custom of the Hindu law of succession need not be assumed, but the presumption that they have adopted the Muhammadan custom of succession should be much more readily made ; the Muhammadan law of succession was applied in the case : *Abdurahim Haji Ismail Mithu* v. *Halimbai*, L. R., 43 I. A., 35 (1915).

In Bombay itself the extent to which the Hindu and the Muhammadan laws are modified in the case of Cutchi (Kachchhi) Memons is stated with some precision in *Advocate General of Bombay* v. *Jimbabai*, 41 Bom., 181 (1915) : (1) Cutchi Memons have acquired by custom the power of disposing the whole of their property by will ; (2) it is not proved that they have

ever adopted as part of their customary law the Hindu law of the Joint Family, as a whole, or the distinction existing in that law between ancestral family, and joint family and self-acquired property ; (3) they are subject by custom to the Hindu law of succession and inheritance as it would apply to the case of an intestate separated Hindu possessed of self-acquired property and no more ; (4) their wills are to be interpreted according to Muhammadan and not Hindu law.

The story of these Khojas and Memons has been told at a length quite disproportionate to their numerical importance, because it illustrates in an unusually impressive manner the inconvenience inseparable from a diversity of uncodified personal laws, especially when differentiated either according to religious profession, or according to varieties of immemorial usage ; the former representing what the Legislature had actually said in this case, the latter being (as Sir E. Perry perceived) what it probably meant. The assumption involved in the former test is that all who observe a certain ritual, or repeat a certain watchword, thereby acknowledge themselves bound in conscience to observe a certain ascertainable body of rules, so that they are not likely to complain of being compelled to observe these rules, but are likely to be exasperated by being prevented from obeying them ; an assumption which held good generally in Hindustan, at the time of the British Conquest, among populations who had been subject continuously for centuries to Muhammadan rule, but which failed conspicuously in those parts of Western India where the immediate predecessors of the British Government were non-Muhammadan, and subsequently in the Panjab for the same reason.

Did it mend matters to fall back on the test of immemorial usage ? Was the assumption better founded that general contentment would be secured by simply continuing to enforce in the future whatever rules had been observed in the past ? Evidently not, so far as these Khojas and Memons were concerned, both of whom showed in different ways considerable restiveness under the yoke of ancient custom. The refusal of the Legislature to intervene, unless under the impossible condition of unanimity in the community to be legislated for, or to allow such communities to legislate for themselves, left unsolved a problem which has certainly not diminished in seriousness since 1885.* As Mr. Justice Beaman remarked with reference to the Khoja community in 1911, " the position of this rich and flourishing community is a peculiarly unfortunate one in respect of many of the most important acts of their lives. But the only remedy for that that I can see would be by legislation. At present it is hard to say what their precise legal rights are in many highly important details relating to the disposition of their property." (*Cassamally Jairajbhai* v. *Ser Currimbhoy Ebrahim*, 36 Bom., 260—261.)

Anglo-Muhammadan Law in the Panjab.

The province which, after Sindh, was the first to fall under Moslem rule, and which was the first to receive each new swarm of invaders from

* In the census of 1911, 537 persons in the Bombay Presidency, and no less than 34,439 persons in the Bombay feudatory States, elected to describe themselves as " Hindu-Muhammadans." Whether any of these were persons previously known as Khojas or Memons does not appear. They probably refer to small local communities, such as Matias scattered over Western India. Their usages are partly Hindu and partly Muhammadan. To do them justice, they do not litigate, or it would be impossible to say what law to apply to them in any given case.

Central Asia, might have been expected to be more thoroughly Islamised than any other part of India. But the persecution which converted the followers of Nanak from a community of harmless reformers into a nation of warriors completely altered all this, and when, in 1849, the Panjab became a British province, its recent history was that some three millions of Hindus and Muhammadans had for the last half-century been held down in common subjection to half a million or so of Sikhs. This may partly account for the fact that the Muhammadans of the province were found to be, as a rule, by no means rigid in their observation of the Shariat, and that the customs prevailing among the rural population in such matters as marriage and inheritance showed traces of a good deal of give-and-take between the followers of Islam and their Hindu neighbours, who on their part were less completely under Brahmanical influence than their co-religionists in Hindustan. Though Ranjit Singh is said to have made some small grants for the encouragement of both Hindu and Muhammadan law studies, there were few competent expositors of either system to be found in the province at the time of the British conquest.

Such being the problem with which the first British administrators had to deal, under general instructions from the Governor-General "to uphold native institutions and practices so far as they are consistent with the distribution of justice to all classes," their first tentative solution was embodied in the compilation known for many years as the Panjab Civil Code, and drafted with a view to being enacted as such, but to which the Government of India did not think fit to allow any higher authority than that of a manual of instruction published by the Judicial Commissioner with the sanction of the Chief Commissioner and of the Governor-General, for the guidance of subordinate judges and magistrates in the exercise of their otherwise unlimited discretion. The first of its two main divisions was entitled "Abstract Principles of Law," and contained (*inter alia*) a rough summary of so much of the Hindu and Muhammadan Laws as it was thought desirable to recognise, drawn from the best authorities then accessible. On these topics, at all events, the "Code" was altogether lacking in the precision and completeness that we are accustomed to associate with that term, and much better fitted for the merely educational function assigned to it by the Governor-General. It hit off, with a few bold strokes, the salient features of resemblance and difference between the two legal systems, and the directions in which local usage tended to deviate from either or both; but it can seldom have been a satisfactory substitute for the text-book or the living expert.

The respective spheres of custom, and of the two bodies of written sacred law, were roughly demarcated as follows in Section III :—

(1) The Hindu and Muhammadan Codes, and the *Lex Loci*, or local custom, or other system of law obeyed by any tribe or sect, may be followed in all matters of civil right and social importance which are not opposed to morality, public policy, or positive law, and which may not have been provided for by any specific rule.

(2) Those who belong to the Sikh persuasion are, in civil and secular affairs, generally bound by the Hindu law.

(3) If the parties to a suit belong to different sects or different tribes, and if the law which they respectively observe should be conflicting with regard to the point in dispute, then the judge, having considered the bearings of both laws on the particular case, will decide according to equity and reason.

(4) In any of the matters described in the first clause of this section the judge may place a definite issue before persons learned in the native law, and file their written opinions with the record. But, if possible, the judge will also consult authorities, and form his own opinion. If the case should have been decided by arbitrators, the Court will observe whether their award is in accordance with law and custom.

(5) Whenever it may appear that the Hindu, Muhammadan, or other law has been in any district superseded by local usage, and that both parties would rather be governed by custom than by law, the Court may ascertain the custom from competent and experienced persons, and decide according to it.

(6) If one party should elect that the suit be decided by custom and the other by law, the Court will determine whether, in the particular case, the law or the custom has the most authority.

(7) The laws and customs, as above described, should especially be observed in matters relating to inheritance, special property of females, marriage, divorce and adultery, adoption, wills, legacies, gifts and partitions. On the other hand, there are many matters in which their observance should be avoided; such as the prohibition of interest; civil disabilities on account of caste, religion, sex, disease, and other disqualifications not allowed under British rule; rights connected with slavery; forfeiture of property, by reason of conversion to a religion other than that in which the party may have been brought up; various periods of minority; absence of any law for the limitation of suits, trial by ordeal, etc.

The sanction of the Supreme Government being of the qualified character above-mentioned, while yet there was nothing else that could be appealed to as the living law of the province, judicial opinions were not unnaturally divided as to the sort of recognition to be accorded to the work in question, nor could the case of the "Code" be logically separated from that of other circulars and orders, emanating from the same executive source with varying degrees of formality and generality. In order to remove these doubts, a clause was inserted in the Indian Councils Act, 1861, confirming *all* laws, orders, and regulations hitherto made for the government of the "non-regulation" * provinces. This indiscriminate consecration raised, as was to be expected, a fresh crop of difficulties; and so in 1872 the remodelled Indian Legislature took the matter in hand, and by the Panjab Laws Act of that year specified *certain* of the existing Regulations, Acts, and orders as those which were to remain in force, and repealed, consolidated, or amended the others. Among the provisions that disappeared were the aforesaid crude epitomes of Hindu and Muhammadan Law, and by ss. 5, 6, 7 of the Act as amended in 1878 (represented by s. 5 of this Digest) it was left to the Courts, as under the old Bengal Regulations, to ascertain in their own way the bearing of these laws on each case as it arose. It will be seen that the matters to be regulated by the personal religious law of the parties are enumerated in fuller detail, but to much the same effect; the really important difference is that whereas the Bengal Regulations, now represented by s. 37 of Act XII of 1887, took no notice at all of custom, and merely referred the judges to "justice, equity, and good conscience" in cases not otherwise provided for, the Panjab Act directs the Court to inquire, in the first place, whether there is any custom applicable to the parties concerned, and governing the matter in question, and assigns only the second place to

* So-called in contradistinction to the older provinces in which "Regulations, passed in exercise of the legislative powers conferred by the several Charter Acts on the Governor General in Council, and on the subordinate Governments of Madras and Bombay, were in force. The "Code" had been extended to Oudh, the next largest non-regulation Province, on its annexation in 1856.

Hindu or Muhammadan law. So far as Hindu law is concerned, even this difference was rather of emphasis than of actual legal effect, because it had everywhere come to be considered consistent with the spirit of that law to recognise diversities of custom when properly proved ; but the spirit of the law of Islam was admittedly adverse to such recognition, which had hitherto been accorded only in Western and Southern India, and only in very peculiar circumstances, so that there was some novelty in the express legislative sanction now given to equal laxity in this respect on the part of Mussulmans and Hindus. The step was no doubt fully justified by the well-established fact of widespread divergence between popular practice and the written law of either religion ; but the hope cherished by some of its advocates, that the ascertainment of custom would make less work for the lawyers than the interpretation of the Hindu and Muhammadan Law sources, was not destined to be realised. Great efforts were made by the Government, through its settlement officers, to find out and record what the inhabitants of each village, and the members of each tribe, considered to be their customs ; but as it did not venture to codify, and stamp with legislative sanction, the results so recorded, their evidentiary value was still a matter for the estimation of the Courts ; and the general disposition of the Courts, especially when it became known that some settlement officers were in the habit of " shaping public opinion in the direction they thought equitable," was to reject the official statement of usage unless it was supported by specific instances in which it had been acted on. Failing this, the party alleging a custom had to prove it by witnesses at his own expense, or else to acquiesce in the case being determined according to the law of his religion.

On one subject, treated elsewhere either as a branch of Muhammadan law or as a matter of special custom, the Panjab Laws Act did actually formulate a complete body of statutory law instead of indicating the source from which the law was to be ascertained, as will be shown in Chapter XII of this Digest and in Appendix C. The peculiar usage known as Pre-emption was found to be so generally observed among the landholders in agricultural districts of this province, irrespective of creed, that there was little difficulty, and much advantage, in enacting it as a territorial law of universal application, unless barred by special custom or express contract. And this was done in a form better adapted than the strict Muhammadan Law to serve the only useful purpose that could possibly justify the institution, and outweigh its economic disadvantage ; namely, that of checking the disintegration of village communities.

Recognition of Shia Law.

In Hindustan the semi-Hinduised Muhammadan, though not unknown, was less in evidence and gave but little trouble to the Courts ; but the importance of the great cleavage between Sunni and Shia began to attract attention in the third decade of the nineteenth century. Macnaghten's " Principles and Precedents," published in 1825, contains a very meagre outline of the principles of the Shia Law of Inheritance, but no precedents ; which is just what we might expect, seeing that the earliest Bengal judgment recognising the right of the Shias to their own law had been delivered in 1822, but was still subject to appeal, and was not affirmed by the Privy Council till 1841 (*Rajah Deedar Hossein* v. *Ranee Zuhooroonissa*, 2 M. I. A., 441). Their Lordships accounted for the absence of earlier decisions by

the fact of there being "very few Shia families in India, except those of the reigning princes." The reference here is no doubt to the Oudh dynasty, the reigning representative of which, notwithstanding his formally declared independence of the puppet emperor at Delhi, was still afraid to make public provision for the exercise of the law of his own sect within his own dominions ; a step which was, however, taken (as already stated) * by his successor six years later. Probably the concealed Shias had always been pretty numerous, and under this double encouragement they soon began to find a good deal of work for the Courts, and to create a demand for fuller information as to their legal system, such as had by this time become generally accessible respecting the orthodox Muhammadan Law. This, therefore, seems a suitable place for a brief general description of—

The Measures taken for ascertaining and administering Anglo-Muhammadan Law.

The commencement of this necessary work was due to the initiative of Warren Hastings. While immediate relief to perplexed European judges was afforded by attaching learned Maulawis and Pandits to every Courts, civil and criminal, whose *fatwas* and opinions were in general to be accepted on all points relating to their respective laws, the policy was announced of compiling as soon as possible English Codes of Muhammadan and "Gentoo" Law, based on the Arabic and Sanskrit authorities—a policy which still awaits fulfilment. The first step in this direction, so far as our subject is concerned, was the publication in 1791 of Hamilton's Hedaya, an English rendering of a loose Persian version of the original Arabic, in which text and commentary were intermixed ; an unsatisfactory method, which had, however, this redeeming feature, that it introduced to the English reader not only the actual doctrines of the medieval jurists, but also the interpretation put upon those doctrines, lightly or wrongly, by learned natives in modern India. The Hedaya supplied at once more, and less, than was wanted for our particular purpose. Like most text-books of its class, it approaches the subject of law from the point of view of religion, and hence contains several chapters relating to matters with which not even a Muhammadan, still less a British, judge would think of interfering. On the other hand, it passed over, for some unexplained reason, the all-important subject of inheritance. This was found to be separately treated in a concise monograph called the Sirajiyah (about the end of the 12th Century A.D.), and a commentary thereon called the Sharifiyah, bearing date about 1400 A.D. A translation of the former, with an abstract of the latter, was executed by Sir William Jones, at the instance of Lord Cornwallis. His translation of the Sirajiyah was twice reprinted by the late Mr. Almaric Rumsey (1869 and 1890).

The question had been considered at a very early date of translating also the Fatawa Alamgiri, the great collection of decisions according to the Hanafi school, compiled by order of the Emperor Aurangzib in the seventeenth century, a work of at least equal authority in India with the Hedaya ; but it was not until 1850 that Mr. Neil Baillie produced a first instalment of this great task in his "Moohummudan Law of Sale," which he followed up in 1853 with the portion relating to the Land Tax in India, and in 1865 with a general "Digest of Moohummudan Law, on the subjects

* See *ante*, p. 25.

to which it is usually applied by British Courts of Justice in India," the first volume of which consists chiefly, though not exclusively, of extracts from the Fatawa Alamgiri, translated as literally as the different idioms of the two languages would admit. We had to wait till 1874 for the second volume, which treats of most of the same subjects according to the Shia, or Imamiya, Law, and the greater part of which is simply a translation from the " Sharai ul Islam." The too modest title of this work (like that of Colebrooke's " Digest of Hindu Law,") tends to obscure the fact that it has at least as good a claim to be considered an original authority as Hamilton's Hedaya.

We have in the Tagore Lectures of 1891–92, by the Hon. Mahomed Yusoof, together with a reproduction of portions of Captain Mathew's translation of the collection of *hadiths* known as the Mishcat ul Masabih, a literal rendering of so much of the famous collection of *fatwas* (responses) by Kazi Khan (d. 1192, contemporary of the compiler of the Hedaya), as treats of Marriage and Divorce ; and in certain portions of Mr. Justice Abdur Rahim's " Muhammadan Jurisprudence " (1911), what is said to be " practically a translation " of Sadr-ush-Shariat's ' Taudih,' a fourteenth century treatise on the Science of Law (*usul*). Translated extracts from other works are from time to time supplied to the Courts for the purpose of a particular suit.

But, meanwhile, from 1825 if not earlier, a more characteristically British method of removing or mitigating the ignorance of European judges has been steadily applied. It is that of recording the questions of Muhammadan Law which have actually been put in issue in British Courts, and the answers given thereto. Under the Company's government these questions were invariably submitted by the judges to their Muhammadan law officers, who were required to support their opinions by citations from standard Arabic authorities.

A collection of these *responsa*, preceded by a general statement of the principles of each branch of the law, as understood by the compiler, was published in 1825 by Sir W. Macnaghten, under the title, " Principles and Precedents of Muhummudan Law," and remained for at least half a century the standard text-book for English readers. The same writer also set the example (1829) of publishing reports of actual judicial decisions of the Company's Appellate Court, dating as far back as 1791, which naturally contained a fair proportion of decisions on points of Muhammadan Law ; formally the decisions of European judges, though naturally based on the *fatwas* of the native law officers. The example soon found imitators, and by Act XII of 1843 the decisions of the Sadr Diwani Adalats at Calcutta and Agra were ordered to be published monthly.

As the store of information accessible to English readers increased, the judges, both of the Supreme Court and of the Company's Courts, began to feel less absolutely dependent on native assistance ; and at last, after the extinction of the Company, and the fusion of the two sets of Appeal Courts in the new High Courts, it was considered that the time had come for dispensing with the latter altogether, at least in the form of Maulawis regularly attached to the Court, and whom the Court was bound to consult (1864). The study of Muhammadan Law was not less important and remunerative than before, but in a different way : henceforth it became the business of the Bar to instruct the Bench, and the later reports are increasingly full of learned arguments in which untranslated Arabic autho-

rities are freely cited by advocates who combine with this special learning a general legal knowledge to which the Court Maulawis made no pretension. Moreover, the Bench, in its turn, gradually became better qualified to instruct the Bar. All the four High Courts have had a learned Muhammadan among their Judges since 1908, and all except Madras since 1895 (except for a short interval at Calcutta). Some of the judgments delivered by Mahmood, J., at Allahabad (1887–1893), and by Ameer Ali, J., at Calcutta (1890–1904), are, in fact exhaustive monographs on difficult points of Muhammadan Law.

The British Element in Anglo-Muhammadan Law.

Our last subject for consideration is the extent to which the special law, administered as Muhammadan to Indian Muhammadans, has come to differ from the corresponding portions of pure Muhammadan Law as administered in Muhammadan States. The modifications resulting from British manipulation have been partly intentional and partly unintentional.

Intentionally (as we have seen) the Muhammadan Criminal Law was first modified piecemeal, and then superseded altogether by the Indian Penal Code.

Intentionally, Act V of 1843, by abolishing slavery throughout British India, rendered inoperative all the learning relating to that subject to be found in Muhammadan law books, including (as was judicially determined long afterwards) all the rules relating to former masters inheriting from freedmen. Long before 1843, however, the Muhammadan law officers had given it as their opinion that strictly legal slavery was hardly possible in India, because its only legitimate origin was capture in a *jehad*, or holy war, and no such war had been waged there within living memory.

Intentionally, Act XXI of 1850 abolished the civil disabilities which the Muhammadan law attached to apostasy, by declaring that no right of inheritance to property should henceforth be lost through renouncing the communion of any religion.

Intentionally, the Indian Majority Act, 1875, raised in one sense, and lowered in another, the age at which a Muhammadan was to become capable of contracting and disposing of property,* and Act X of 1891 made punishable as rape such early sexual intercourse (the woman being under twelve years of age), as between husband and wife, as might have been permissible under a law which mainly regards the natural facts of puberty in individual cases rather than a particular age applicable to all (Baillie I. 54).

Intentionally, the statutory provisions about pre-emption in the Panjab, the North-West Frontier Province, and Oudh (see sec. 353 of the Digest) have considerably modified the Muhammadan Law of pre-emption enforced in those Provinces ; while unintentionally the varying decisions of the different High Courts on the subject have produced modifications which all go under the name of Muhammadan Law, but have in some cases diverged from the original objects held in view in enforcing the right of pre-emption or vicinage.

Unintentionally, the dovetailing of one department of an archaic system of family law into a system of which all the other departments are

* See under s. 137 of this Digest.

of modern European type has altered very materially the practical operation of the former, even when the authority of its text-books remains unchallenged. Thus the institution of legitimation by acknowledgment of paternity was meant to form part of a legal system which permitted cohabitation with slave concubines, while punishing with the utmost severity all sexual intercourse not founded on either marriage or proprietorship. Surviving as it does in connection with a system which provides no punishment for simple fornication between consenting adults, while it treats slave-holding as one of the gravest of crimes, and more especially slaveholding for the purpose of concubinage, it has given rise to perplexing questions never contemplated by the Muhammadan jurists, and for the solution of which the standard text-books afford little or no assistance.

Another source of far-reaching though unintended modification was the substitution of *judiciary* for *professorial* case-law. The Arabic treatises which we had to take as our starting-point, were products of the former. In the palmy days of Islam, the building up of law from the two-fold foundation of the Koran and the traditions proceeded chiefly by way of discussion in the schools and successive layers of commentary, in which no greater attention was paid to cases actually litigated than to questions privately propounded by perplexed laymen for the ease of their consciences, or mooted between teacher and student for the sake of testing a principle. The advantages and disadvantages of this system were long ago pointed out by Sir H. Maine, in connection with a somewhat similar stage in the development of Roman Law.* The disadvantage is that you do not get out of it anything that can properly be called law until the discussion has been closured, so to speak, by some governmental action rendering it possible to predict with reasonable certainty what rule will be followed in actual litigation. The only way in which the range of uncertainty was gradually narrowed in the Muhammadan states of Central Asia and India seems to have been this ; that the sovereign was compelled by public opinion to select his judges from the *ulama*, or men of recognised learning, and that there came to be a sort of tacit conspiracy among the *ulama* to discourage innovation, and to treat the knowledge of certain standard treatises as necessary and sufficient.

In the matter of *wakfs*, or public and private endowments, there was, as will be pointed out later (see Appendix B), a progressive tightening of case-law against the recognition of private settlements, until the passing of the Mussalman *Wakf* Validation Act, 1913, which settled a vexed controversy as far as *wakfs* created subsequently to the Act are concerned.

In one branch the degree of certainty already attained by text-book law was sufficient, or nearly sufficient, to satisfy our requirements. The law of inheritance, unlike most other branches of law, is in its nature capable of being stated precisely and exhaustively, so as to provide for every possible contingency ; and this desideratum was found to have been supplied, from the point of view of the Hanafi school by the Sirajiyah as translated by Sir W. Jones, and supplemented by his abstract of the Sharifiyah, subject to a few confessedly disputed questions of quite minor importance, only one of which has since been raised in a British Court. It only remained to re-arrange and illustrate the statements of the Sirajiyah, so as to make the system more easy of comprehension by European students, a task ably performed by Mr. Baillie in 1832, and to show the

* Ancient Law, p. 38.

working out of the examples according to the English rules of vulgar fractions, as was done by Mr. Almaric Rumsey in 1866. Hence nearly all the reported rulings on the subject of inheritance bear date prior to 1850, and represent answers supplied without hesitation by the Muhammadan law officers from the sources above mentioned, so that the influence of British judges on this branch of law has been scarcely perceptible.

It has been otherwise with the other reserved topics—marriage and paternity, wills and gifts, religious endowment (*wakf*), and pre-emption. In all these departments the accumulation of case-law has been so great as almost to hide from the modern practitioner the original Arabic foundation. And while the aim of British judges has always been to interpret and not to legislate, the mere fact that a dispute exists respecting the interpretation of a text, or as to the best way of reconciling conflicting texts, proves that when the point has been judicially determined, a new law has in effect been made, having regard to our traditional English view of the binding force of precedent. It was also inevitable that a law thus made by a single decision, or a current of decisions, should occasionally be out of harmony with the spirit of the ancient authorities, or with the practice and established expectations of modern Muhammadans, or with both; in such cases the Courts were, and are, powerless to remedy the mischief. The better-instructed judge is bound by the decision of his less-instructed predecessor. Where such mishaps occur in England, or even in India respecting the interpretation of British-made law, there is the Legislature to fall back upon; but our traditional policy is opposed to legislative interpretation of the native laws. Thus the Indian Law Commissioners, in their Second Report, gave it as their opinion that "no portion either of the Muhammadan or of the Hindu Law ought to be enacted as such, in any form, by a British Legislature"; though what difference there could be, either in principle or in moral effect, between legislative and judicial interpretation, was not then, and never has been, explained. If it is apprehended that irritation might be caused by the former, it is matter of experience that irritation has been caused by the latter, as well among Muhammadans as Hindus. The mistake made respecting *wakf*, of which a tardy remedy has been attempted in the Mussalman Wakf Validating Act, 1913, is a recent and conspicuous example.*

Supposing it were possible to ensure the exact conformity of judge-made Anglo-Muhammadan Law to the standard of thirteenth, seventeenth, or nineteenth century orthodoxy, the graver question would remain—how far this state of things would be likely to give satisfaction to Indian Muhammadans of the twentieth century. Of this we should be better able to judge, while at the same time the question would be less important, if any tolerable alternative were provided for those who do not wish either to abjure Islam or to be governed in all their family relations by usages dating from the Middle Ages. Considering the intellectual ferment now going on among Indian Muhammadans, and looking especially to the wide publicity given to the views of Mr. Ameer Ali, it is difficult to suppose that there are none who would jump at the opportunity of contracting a legal marriage on a footing more distinctly monogamous than can be secured by even the most carefully drawn contract under Anglo-Muhammadan Law, if the thing could be managed without the formal apostasy required by Act III of 1872, and still more if some of the other provisions

* See Appendix B.

of that Act were less servilely copied from the far-from-perfect matrimonial law of England. Even if we have to admit that the sect of modern Motazilas * is as yet invisible to the naked eye of the statistician, its potential existence is proved by the mere fact of the principles attributed to it being those of an eminent lawyer, and no less eminent literary champion of Islam, and a legislative system which leaves no room for such opinions to grow, take shape, and express themselves in concrete practical principles, cannot be expected to satisfy either the lovers of religious equality or the advocates of social progress. With the Khoja and Memon precedents before us, the question must still suggest itself, why should the adoption of a new matrimonial law, not in conflict with the spirit of Islam, and more in harmony with the general practice of the Indian Muhammadans, be more incompatible with profession of Muhammadanism than the retention of an old non-Koranic law of inheritance ?

The case of Dr. Anwaruddin, referred to in note 4, Art. 39 below, lends point to the hardships that arise in mixed marriages to which one of the parties is a Muhammadan.

Sir Rowland Wilson † pleaded in 1898 for a policy of concurrent general and special codification ; that is to say, for a general code of marriage and succession, to be applied to every Indian who had not indicated by the form of his marriage an intention to be governed by some recognised special code ; and for as many special codes (short of the number which would cause serious administrative inconvenience) as there might be groups of persons desiring to be differentiated in these matters from other groups and able to agree upon a set of rules not manifestly unfit for judicial enforcement. But the dream of 1898 seems to be no nearer realisation in 1919. The political Reforms foreshadowed by the Montagu-Chelmsford Report do not touch the question of social legislation for Muhammadans and Hindus nor provide any machinery for progress in that direction. In the meantime, students and practitioners have to make the best of the system, or lack of system, delineated in the following Digest.

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* See the last chapter of this Digest.

† In the *Asiatic Quarterly Review*, October, 1898.

VII.

OUTLINE OF ANGLO-MUHAMMADAN LAW.

A FEW remarks on the characteristics of the Shariat as a whole may perhaps help to render intelligible the comparatively small portion which is still enforced as law in British India.

The Sacred Law, being primarily a code of individual duty, will not be judged quite fairly if we simply compare its commands and prohibitions with those to be found in codes of purely positive or forensic law. But even when we allow for this, and pick out from the mass for the purpose of comparison those rules which are meant for judicial enforcement, we shall find it quite easy to understand how it is that the populations to whom it has been administered in its entirety have not attained a very high standard of order and prosperity, or of progressive adaptability, and why it was impossible for British statesmen to accept permanent responsibility for the greater part of it. *

The Muhammadan Law of Property and Contract is not without its good points ; *e.g.* the encouragement offered to agricultural enterprise by the principle that " whosoever cultivates waste lands does thereby acquire the property of them ; " † and most of the rules relating to agency‡, which come about as near to modern notions as the Roman Law of Justinian. Up to a certain point, indeed, the spirit of Islam is very sympathetic towards commerce, as might be expected, considering that its founder began life as a commercial agent. But the whole law of sale, mortgage, and loan is fatally vitiated by the anti-usury craze, for which the Prophet is not responsible. The Koranic texts do not necessarily imply more than disapproval of extortionate money-lending ; but according to a tradition preserved in the Mishcat, the Caliph Omar thought it safer from a religious point of view to take them in the strictest sense that the words could possibly bear. " Omar Ibn-Al Khattab said, ' The last thing which came down is the revelation regarding interest' ; and verily, *His Highness departed this life without having explained it to us ;* therefore abandon interest, and everything in which there is doubt about it."

The lawyers developed this view with the aid of various other sayings attributed to the Prophet—which, of course, he could not have said, supposing the above tradition to be accurate §—so that not only are all

* The reader who wishes to see how large a part of the Moslem population, even under the greatest of professedly Muhammadan Governments, has come perforce to be regulated by codes of the modern European type, should consult Young's " Corps de Droit Ottoman," Clarendon Press, Oxford, 1905 and 1906.

† Hed. 610.

‡ Hed. 376—399.

§ *E.g.*, even a non-Muslim view of the Prophet's intelligence and character would acquit him of having said, " the taking of interest has seventy parts of guilt, the least of which is that a man commit incest with his own mother."

loans for interest, however moderate, or however great the risk, illegal, but foreclosure of mortgages is forbidden, lest the creditor should indirectly get back more than the value of his principal, and minute regulations are laid down as to the exchange of fungible things lest the principle should be evaded. The prominence given to the contract of *mozaribat*, corresponding to the French *commandite*, in which one party supplies capital and the other skill and labour for an undertaking of which the profits are to be divided between them, is due to the fact that traders and agriculturists are debarred from the ordinary mode of raising capital by way of loan.

On the whole, the state of this branch of the law, while fairly well adapted to the simpler forms of commerce, must have made the successful conduct of distant and complex mercantile transactions well-nigh impossible for the conscientious Mussulman, and must have tended, even more than the teaching of the Church in medieval Christendom, to throw all such business into the hands of the Jews.

The severity of the Muhammadan criminal law has been incidentally touched upon already. The specifically ordained punishments for certain offences—stoning or scourging for adultery, amputation for theft, scourging for slander and wine-drinking—do not commend themselves to the modern legislator, though they are not more barbarous and inappropriate than large portions of the European systems against which Beccaria and Bentham directed their attacks; but much laxity and uncertainty was introduced into the administration of justice by the wide scope left for magisterial caprice in regard to *tazir*, or discretionary punishment, in all the very numerous cases for which no *hadd*, or specific penalty, is provided. Still more archaic is the treatment of homicide; the option allowed to the private avenger of blood either to slay the slayer of his kinsman, or to require him to be slain by the public executioner, or to accept pecuniary compensation; and the rule that killing by poison is not murder unless the deceased was actually forced to drink the poison.

The Muhammadan rules of evidence also hampered the administration of justice in a mixed community, so long, and so far, as the Company's Courts were supposed to be bound by them; though if the only alternative had been to substitute the English law on that subject, as it was understood during the first half of the last century, the loss and gain might have been nearly balanced.

Of course, the preserved portions of Muhammadan Law were not preserved solely or chiefly as being better than the above-mentioned portions which have been abolished, but because, owing to the nature of the subject-matter, there was no urgent need for insisting on uniformity, and the defects, whatever they might be, would only affect the class of persons to whom the maxim *Volenti non fit injuria* * was supposed to apply.

So long as Hindus and Muhammadans cannot or do not intermarry it matters nothing to the Hindu that his Muhammadan neighbour may divorce his wife at pleasure while he himself cannot; or that, while he can supply the place of a real son by means of adoption, his neighbour cannot; or that when the Muhammadan dies his estate will be split up into small fragments in a way which would be prevented by his own joint family system; though it would matter very much to the Hindu neighbour,

* There is no wrong where there is consent.

and to the whole community, if the Muhammadan thief or murderer had to be tried by a different law of evidence, and judged by a different penal code. Men and women who profess the faith of Islam are presumed, rightly or wrongly, to do so as a matter of free choice, and to desire the maintenance of their Sacred Law even where it bears hardly on themselves.

It will be noticed that the portions of Muhammadan Law retained and enforced by the Anglo-Indian Courts have at least the outstanding merit of elasticity in most cases where the rules differ fundamentally from those in other juristic systems. The normal legal relations laid down admit on many points of being varied by contract. The marriage law allows great freedom, perhaps more freedom than any other important system. The rules about guardianship and maintenance of relatives are founded on commonsense. The rules about inheritance and gifts are based on the desire to prevent the accumulation of property in a few hands, but one-third of the net assets are at the disposal of the testator to bequeath as he likes. On *Wakfs* and Pre-emption, the original elasticity of Muhammadan Law, which held certain religious and social considerations in view, has been much restricted in Anglo-Muhammadan Law. Perhaps it ought to be admitted that the conditions originally contemplated no longer apply.

Naturally, the arrangement best suited to a Digest of Anglo-Muhammadan Law will have no sort of correspondence with the places assigned to the several topics in Arabian treatises dealing with the entire Shariat, in which, moreover, no fixed order is necessarily observed. It will be found that all the topics with which we are concerned are more or less closely connected with family relations. The common root of all family relations is sexual connection, and the law regulating that subject has for its central and most important department the Law of Marriage. In point of fact it is not the whole of the Muhammadan Law regulating the relations between the sexes that is recognised and enforced by the British Courts, but only so much of it as bears on the institution of marriage, and of that again only so much as is capable of being dealt with in a civil suit.

The Muhammadan Idea of Marriage.

The spirit of the original system is well indicated by the Arabic word for marriage, and the accepted definition thereof.* According to the Hedaya, "Nikah," in its primitive sense, means carnal conjunction. As a legal term it was defined in the Kanz—a work of repute, a century later than the Hedaya—as "a contract for the purpose of legalising generation;" which expression, however, a commentator explains as including both the right of enjoyment, and the procreation of children. Of course, all systems of matrimonial law have this for their starting-point. The imperiousness of male desires, and the importance, for the peace of the community, of directing them into safe channels, are considerations which cannot fail to suggest themselves in the very infancy of law; and not much later comes the sense of the value of children as property, and of the expediency of assigning each to some male in particular, together with the woman who is to suckle and rear it. A growing system finds room, as it expands, for quite other conceptions of the meaning and purpose of conjugal union. With clearer perception of the difference between good and bad sons, and

* See Baillie, p. 4., where, however, the additon to the sexual aspect, *viz.*, the moral aspect, "it was also instituted for the solace of life," must not be lost sight of.

of the influence of blood and training, comes heightened appreciation of the dignity and responsibilities of motherhood, more care to obtain wives from a good stock, and more disposition to prolong the union at least till the children are grown up. Then, the example of the wiser individuals gives the tone to public opinion and religious beliefs, which ultimately harden into positive law.

Thus a gloss on Tirmizi * (d. 893 A.D.) sets out five objects of marriage, *viz.* :—(1) the restraint of sexual passion, (2) the ordering of domestic life, (3) the increase of the family, (4) the discipline of the soul in the care and responsibility for wife and children, and (5) the upbringing of virtuous children. A modern Indian Muhammadan writer,† in defining the objects of marriage, lays stress on the need for true sympathy and affection between the parties, a sharing of joys and sorrows, and describes a permanent and public union of this kind as the "Nikah" of Muhammadan Law. He would sum up the objects of marriage under two heads, one referring to the children, and the other no less important, and indeed, essential to the perfecting of the first, love and affection between the married couple. It is because of the second object, love and affection, that he would justify divorce where these are wanting; for divorce, according to a well-known Hadith, is, of all things allowed, the most disapproved in the sight of God. The Hedaya also (p. 40) speaks of the ends of marriage as cohabitation, society, and equal friendship. Hindu religion regards the matrimonial tie as indissoluble even by death, and as having indeed for its main object felicity in a future life; and Hindu law follows suit, with consequences for good and evil of the weightiest kind.

According to the special needs of his time and country, the Prophet was a very earnest champion of women's rights; the form which his advocacy took resulted in stamping out female infanticide, laying down definite restrictions to the earlier Arab license about marriage, and enabling free-born women to pursue under more tolerable conditions the only vocation then open to them, that of child-bearers and child-sucklers; with some measure of freedom in choosing their employers, some protection against gross tyranny, some reasonable notice before dismissal, and above all with a substantial pecuniary equivalent for the sacrifices demanded of them. He found them, at least in some tribes, the property of their male kinsmen, to be used, sold, or let to hire like other chattels. He left them (at least as his precepts were understood by the Hanafi school) possessed of full legal personality, capable of acquiring property and contracting on their own account, and conversely amenable to the general criminal law, but with their rights of inheritance on the one hand and their punishments on the other, defined in most cases at one-half of those provided for free males.

Leading Features of the System as developed in the Hanafi School.

The gradual working out by the Hanafi lawyers of the few but important maxims laid down on the above lines in the Koran resulted in a system of which the following are the leading features.

1. All sexual intercourse not expressly permitted by the law is denounced as fornication (*zina*) and incurs very severe penalties, viz.

* Lucknow Edition, by Fazl Ahmad Dilawari, Nawal Kishore Press, p. 329, vol. I.

† Saiyid Mumtaz Ali, Huqūq-i-Niswān, Lahore 1898, pp. 102-3, also pp. 29-30.

scourging in the case of unmarried and death in the case of married persons of either sex.*

2. The connections sanctioned by the law are of two kinds only :— (1) with a wife (or wives, not exceeding four at the same time) regularly married ; (2) with female slaves lawfully acquired.

3. Regular marriage is a matter of contract, the terms of which depend, within very wide limits, on the will of the contracting parties and to the validity of which no religious ceremony is necessary.

Now that the legislature of British India has on the one hand abolished the Muhammadan Criminal Law without substituting any penalties of its own either for simple fornication or for adultery except by a man with another man's wife,† and has, on the other hand, abolished slavery and with it the possibility of the only kind of concubinage permitted by the Shariat, the stern consistency of the original system has been entirely broken up, and we can only say vaguely that *Anglo-Muhammadan Law* points to a regular contract of marriage as on the whole the most convenient and laudable preliminary to sexual union, and as a generally but perhaps not invariably necessary condition for the establishment of legal paternity.

The terms of this contract, as implied by law in the absence of special stipulations, are, roughly speaking, that the wife is bound, after receipt of the stipulated payment of dower, and unless and until he chooses to grant her a divorce—

To give her husband his conjugal rights, moral and physical, whenever he requires her to do so, due regard being had to health and decency ;

To have no intercourse of any kind with strangers without his permission ;

To suckle her children by him if, and only if, he cannot conveniently hire a nurse ;

And generally, to conform to his wishes in regard to household arrangements, but not to perform menial services if he can afford to keep servants ;

And that the husband is bound—

To give money or money's worth for his marital privileges, part of it immediately and the remainder on the termination of the marriage by death or divorce ;

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* The question of punishments for *zina* as laid down in the *Shariat* is of no importance in Anglo-Muhammadan law, as crimes are dealt with in Anglo-Indian Courts under the provisions of statutory law. Historically it may be of interest to note that the Koran (xxiv. 2) says nothing about the punishment of stoning to death, but in all cases orders 100 stripes. The question arose in the time of Omar, who restored the Jewish penalty of stoning to death on the ground that the Prophet had himself inflicted it in certain cases. The authoritative jurists treat the Koranic injunction as abrogated, and make the distinction stated in the text in regard to the penalties incurred by married and unmarried persons, respectively. It may be added that as *four* eye-witnesses to the deed are required, a conviction is practically impossible except on a confession, and a confessing party is expressly to be warned by the Judge of the penalties incurred, and is permitted to withdraw the confession. If the husband swears as an eye-witness against the wife, and the wife swears to the contrary, the wife is acquitted ; but she may be divorced.

† The Indian Penal Code, s. 497, provides for the punishment of a male who commits adultery with another man's wife, but not for that of the adulterous wife, nor for that of either of the guilty parties where the adultery is on the part of the husband, but the woman is unmarried.

To maintain her suitably to his position during the continuance of the connection; and if he has more than one wife—

To provide each with a separate apartment,

And as far as possible to distribute his attentions equally among them.

A Muhammadan Kazi, like the English Ecclesiastical Courts in old times, would apparently be expected to enforce by appropriate penalties every detail of domestic duty; but an Indian Civil Court will only take cognisance of them indirectly, as they may happen to affect the question whether a wife should be compelled by threat of imprisonment to return to her husband, or whether, on the other hand, he should be compelled to provide for her maintenance in spite of her refusing to live with him.

Dower.

The above-mentioned payment on the part of the husband is called in Arabic *mahr*, and by English writers *dower*. The latter term is somewhat misleading to those who are only familiar with its narrow signification in modern English law, but, taken in its older and wider sense, is perhaps the least unapt equivalent that our legal vocabulary can supply. Dower, the French *douaire*, the low Latin *doarium*, which again is a corruption of *dotarium*, is evidently a derivative of *dos*, with which indeed it is sometimes used interchangeably; but a more general and more convenient usage employs it to denote a widely different institution, namely, the Teutonic as contrasted with the Græco-Roman type of marriage-settlement. Already, near the beginning of the second century A.D., this contrast had begun to attract attention, so that Tacitus noted as a peculiarity of German usage that "the husband brings a *dos* to the wife, instead of the wife bringing it to the husband."* And we still find the prevailing sentiments of Englishmen and Frenchmen on the subject of matrimony perceptibly coloured by a corresponding difference, maintained down to quite recent times, in their laws respecting the property of married women.

The sentiment pre-supposed and encouraged by the dotal system is that matrimony is on the husband's side a burdensome duty, which the wife's family must bribe him to undertake by placing at his disposal, so long as the conjugal union subsists, the income of land or other property which is itself jealously withheld from his control, and which reverts on the termination of the marriage to the wife or to her family.

The sentiment underlying the dower system is that the bride is a prize to be won, if not by the primitive methods of force or purchase from the parents, then by gifts to the maiden herself; which again implies that in the married state the wife is expected to minister to the gratification of the husband, rather than the husband to that of the wife, and that she will have no further opportunity for making acquisitions on her own account. Thus the English dower, representing the old German Bride-Price and Morning Gift, and consisting originally of whatever the husband chose to declare "at the church door," then limited by law to a certain proportion of his assets, and secured by law up to a certain minimum, was a natural complement and reasonable mitigation of the common law rule of the so-called "unity of person," *i.e.*, of the merging of the wife's legal personality

* Tacitus, "Germ.," 17.

in that of the husband. Ultimately a movement in the reverse direction set in, commencing with the protection of marriage-settlements by the Court of Chancery, and culminating in the Married Women's Property Act of 1882, the effect of which has been to make the wife an absolutely distinct person from her husband, able to hold and dispose of property exactly as if she were single, except what may have been placed by means of a marriage-settlement under what is practically the dotal system ; while side by side with this advance there has been a gradual whittling away of her once considerable and indefeasible rights of inheritance, until the point has been reached that the husband can destroy even her dower-right in a third of his lands and will away from her the whole of his property, real and personal.

The Muhammadan dower resembles the English in being a provision made for the wife out of the property of the husband. It resembles the old, not the modern, English dower in being primarily determined by pre-nuptial contract, but assessable by a Court of Justice in default of contract, and also in being the consideration for a bargain, of which the chief advantage would otherwise be on the side of the husband. Like the old, but unlike the modern, English dower, it has no necessary connection with land, and does, in fact, most often consist of a sum of money. Unlike the English dower of any period, the greater part usually is, and the whole may be, entirely and immediately at the disposal of the wife ; and even as regards the portion (if any), of which payment has been deferred till the termination of the marriage, though she cannot squander it by anticipation, there is nothing to prevent her releasing it in favour of the husband himself. And, as with the dower, so with all other acquisitions of a married woman, whether made before or after marriage, her power is as absolute and independent as that of an English wife under the Married Women's Property Act, 1882. The doctrine of " unity of person " has no place in Muhammadan matrimonial law. It would, indeed, be intolerable that a woman should lose her proprietary rights, and her freedom of contract, in consequence of a connection which the husband can terminate without judicial intervention, except in certain cases.

Divorce.

Matrimony is a civil contract, and may, like any other contract, be terminated by mutual consent. Each sex has rights against the other (Koran, ii. 228), but for physiological and social reasons, there are differences in the position of man and woman both in the married state and in divorce. The man can, of his own act, divorce the woman under certain formalities against her will ; in that case the deferred dower becomes due, and she has besides certain rights to a house and maintenance, and certain rights of inheritance from him, for a stated period. The woman cannot, of her own act, divorce her husband against his will, unless she has this power by a previous contract with him, whether ante-nuptial or post-nuptial (see s. 67 of the Digest below) ; by means of khula (see below, ss. 60, 69–71), she can induce her husband to grant her freedom ; and she can for certain reasons obtain a judicial divorce, or judicial separation, without forfeiting her dower, or (for a stated period) her right to maintenance and inheritance. In order to prevent hasty divorce, family councils of conciliation are enjoyed, in which both families are represented (Koran, iv. 35), and certain restrictions are imposed on the remarriage of divorced couples.

In fact there is an intermediate stage between the full married state and the state of complete irrevocable divorce.

The Normal Relation Modifiable by Special Stipulation.

This liberty of divorce, as well as the one-sided permission of polygamy and the one-sided social restraints imposed on the Moslem wife, are the natural results of complete freedom of contract, and rigid enforcement of contract, between parties so unequally matched as were men and women generally, either in the time of the Prophet or under the Baghdad Caliphate; in the woman's case a life of celibacy impracticable, her chances of acquiring wealth extremely limited, her need of protection extreme; while the man was quite able to live single if he pleased, or to gratify his passions with slave concubines. But where the woman is by any chance in a position to make a better bargain for herself, the same principle of free contract tells in her favour. She, or those negotiating on her behalf, can make it an express term in the marriage-contract that the husband shall not take a second wife, or that, if he does, she shall have the option of divorce, or even that he shall divorce her at any time on her demand. And, though an absolute stipulation that she shall never be divorced will be void in law, she can make herself practically secure by stipulating for a dower so large that it will be inconvenient or impossible for him to pay it, on the understanding that it will not be exacted unless he divorces her, or takes a second wife, or otherwise misbehaves. The impossibility of acquiring slave concubines in British India might be expected to strengthen the position of wives in the marriage-market; and bargains of this advantageous kind are said to be now not very uncommon. For a very strong instance which came before the Court in 1874, see under s. 40 of this Digest.

The Pardah System.

In most Muhammadan communities the legal freedom of women is, to some extent, nullified in practice among the upper classes by the fashion of seclusion; a fashion partly traceable to certain peculiarities of the Muhammadan criminal law, themselves not obscurely connected with personal incidents in the life of the Prophet *; partly to a social *milieu* conditioned by history; partly to causes which operate everywhere in proportion to the predominance of the militant over the peaceful elements of society. Before marriage the bride-elect has very little first-hand knowledge to depend on in deciding whether or not to accept the arrangement provisionally made for her by her parents or kinsfolk, although the Sharial expressly allows a meeting between a couple contemplating matrimony "in order to encourage love between them." † After marriage, her limited opportunities of intercourse with strangers must render it more difficult than in England to bring either law or public opinion to bear against a tyrannical husband, and more easy for him to wheedle or intimidate her into giving up her property, than it would be in England, even without the protection of trustees.

Impunity of Unchaste Wives.

On the other hand, the combination of British-made criminal law and Muhammadan civil law has produced the singular result that in a

* See Muir's "Life of Mahomet," p. 293.

† Tirmizi, I. 332.

strictly legal point of view the wife risks absolutely nothing by unchastity. The husband can, no doubt, divorce her for that reason, but he can also divorce her for any other reason, or for no reason. She does not, in any case, forfeit her dower, and the criminal law will have nothing to say to her,* but will have much to say to him, should he be provoked to take the law into his own hands, as he might have done with impunity, even to the extent of killing both wife and paramour, according to the prevailing opinion of Muhammadan lawyers of the Hanafi school.

Rules Restrictive of Intermarriage.

Lastly, if we inquire between what persons the matrimonial bond may be contracted, the answer of Anglo-Muhammadan Law is as follows:

The degrees of *consanguinity* which cause prohibition of intermarriage are the same as in England, except that the prohibition extends beyond nieces and nephews to every lineal descendant of a brother or sister.†

Affinity is only a bar to *successive* unions when it occurs in the direct line of ascent or descent. In other words, a Moslem may marry his deceased or divorced wife's sister, or his deceased or divorced brother's widow, though not the widow of his father or of his son. But affinity is a bar to *simultaneous* unions to the same extent as consanguinity. In other words, a Moslem may not have two sisters, nor even an aunt and a niece, as his wives at the same time.

Besides consanguinity and affinity, Muhammadan Law has one ground of prohibition quite peculiar to itself, namely, connection by *fosterage*. A boy and girl suckled by the same woman within the period of milk covered by one childbirth, usually fixed at two years or 30 months (see s. 37 of Digest), become thereby, though otherwise unrelated, no less completely debarred from intermarrying than if they were brother and sister; and the prohibition extends, broadly speaking, to all who would be within the prohibited degrees of consanguinity if the act of suckling had been an act of procreation. Such connections were certainly more likely to be known and remembered in ancient Arabia, where the habit was to send the infant to the home of the wet-nurse instead of bringing the wet-nurse to the child, and to let it remain there sometimes for several years, than in modern India or modern Europe.‡

The general state of Arabian society was still mainly nomadic, and within the tribe, democratic. A child sent out to be nursed with a foster-mother became practically adopted into her family. His relation would be not only with the foster-mother personally but, also with her relatives generally. The drinking of her milk was also considered as a sort of "participation of blood" (Hedaya, 68.) The milk was the source of the child's growth and increase, and it was a constituent portion of the woman's body. Participation in her milk was, therefore, participation in her body,

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* In the North-West Frontier Province and Baluchistan, however, a married woman is punishable for adultery.—Reg. IV of 1887, s. 32, reproduced in the Frontier Crimes Regulation, III of 1901.

† Short as is the Muhammadan list of prohibitive degrees, that of the Pre-Islamite Arabs was still shorter, allowing, for instance, intermarriage with step-mother and half-sister by the father's side. Some restrictions were expressly imposed by Muhammad (K. iv-27, Sale, p. 56), and these were extended by analogical interpretation.

‡ See Muir, "Life of Mahomet," p. 7, as to the Prophet's kindliness in later life to his foster-mother and foster-sister.

and from this point of view, marriage between foster-relations might well seem like incest, and was prohibited. But the prohibition was also "attached to the milk of the man, that is to say, to the milk of which he is the cause" (Hedaya, 69). The woman's milk was due to child-birth generally; the man who was the cause of the child-birth gave a portion of his body to her, and her milk is thus connected with his body, and the child whom she nurses thus grows out of a portion of the body of her husband. This sentiment, combined with that of close domestic intimacy, gave rise to the prohibition of inter-marriage between "milk-relations." Elaborate rules have been worked out on this subject, which have, however, little application in modern India, because (1) of the use of artificial infant foods, and (2) the difference in the social status of the wet-nurse.

Lastly, difference of religion is in some cases a bar to intermarriage. That is to say, it may prevent the union from being recognised as a Muhammadan marriage, leaving its validity to be determined by the law of the non-Muhammadan party. A Moslem woman is considered to have apostatised by marrying a member of any other religious communion; a male Moslem may lawfully marry a Christian or a Jewess, but not an idolatress; consequently, when Akbar and other Mogul Emperors married Rajput princesses the latter were required to make a profession of Islam.

Parentage.

The Muhammadan system resembles the English, and differs from the Hindu, the Roman, and most of the Rome-derived systems in refusing to recognise adoptive paternity as the source of any legal rights or duties whatsoever. The rights of paternity belong to the lawful begetter, filial rights to the lawfully begotten, and to no one else. The British Government, having abolished slavery, and with it the possibility of lawfully begetting a child of a female slave and then elevating him to the position of a son by acknowledgment, the only source of legal paternity is conception in lawful wedlock, *proved or legally presumed*. The indulgent English view, that birth after marriage precludes all question as to the time of conception, is not countenanced by the law of Islam. On the other hand, if a Moslem chooses to acknowledge a boy, who would otherwise be fatherless, as his son, or a girl as his daughter, this raises a presumption of legitimacy so strong that our Courts have only recently and with difficulty made up their minds that it is not conclusive. (See s. 85 of the Digest.) There is, however, in a very limited number of cases, a right of adoption as kin by mutual contract, for purposes of inheritance (see s. 262 of the Digest). The right of adoption has also been recognised by statute for Muhammadan Talukdars of Oudh (p. 158 below).

Guardianship.

This branch of Muhammadan Law now merely fills up the interstices, so to speak, of the Guardians and Wards Act, 1890.

In strict law, according to the Hanafi school, the only kinds of guardianship recognised are (1) that of lunatics, which is outside the range of Anglo-Muhammadan Law, and (2) that of minors; though adult women are, if married, subject to certain clearly defined marital rights affecting their personal but not their proprietary independence, and are, if unmarried, dependent on the good offices of male protectors (usually, though not with

strict propriety, called guardians) for the chance of accepting or rejecting a husband.

Whether we are concerned with lunatics or with minors, it is convenient to distinguish guardianship of the *person* from guardianship of *property*, and the same individual is not necessarily the fittest for both functions. This distinction is fully recognised by the Indian Guardians and Wards Act, as well as by English and Roman Law. But the Muhammadan Law goes further, and distinguishes two kinds of guardianship of the person of a minor, viz. (1) for custody and education (*hizanat*), (2) for contracting in marriage (*jabr*). In respect of the former it is more liberal to the weaker sex than the law of England, in that it gives the custody of young children (boys up to seven, girls to the age of puberty) to the mother as against the father. This mitigates to some extent one of the most painful consequences of the power of divorce, but it is conditional on the divorced wife remaining single or marrying a near relation of the minor and conducting herself with propriety. On the other hand, the disposal in marriage of a girl, and of course *a fortiori* of a boy, is the father's exclusive prerogative, and if he be dead it devolves on the father's father, then on the male agnatic collaterals in order of proximity—even the most remote taking precedence of the mother. The third kind of guardianship, that of property, belongs, of course, primarily to the father; after his death, to the person appointed by his will, if any; in default of a testamentary guardian the appointment rests with the Court, no relative except the father being able to claim the office as of right.

Chapter V of the Digest deals separately with (1) Guardianship for Marriage, which depends entirely on Muhammadan Law; (2) the General Law of India respecting the appointment and declaration of guardians of the persons and property of minors, in the exercise of which function the Court is to be guided by what, *consistently with the law to which the minor is subject*, appears in the circumstances to be for the welfare and interest of the minor; (3) provisions of the Muhammadan Law as to who are guardians of the person of a minor; (4) the General Law of India as to the duties, rights, and liabilities of guardians; and (5) the General Law of India with respect to the termination of Guardianship.

Maintenance.

A very important part of the Law of Family Relations is the regulation of reciprocal rights of maintenance. The Muhammadan Law, like the English, treats property as primarily and naturally individual; it does not, like the Hindu system, contemplates as the normal state of things the existence of a mass of family property, kept together through several generations as a common fund for the common needs, material and spiritual, of its members; nor does it lend itself so easily as English law to artificial imitations of this system by means of entails and family settlements. Only in one case—that of the wife—can a person possessed of property sufficient for his or her maintenance claim to be maintained at the expense of another person, and there the maintenance is, as we have seen, in the nature of consideration for a bi-lateral contract. A father is under no obligation to maintain his adult and able-bodied sons, nor his married daughters. Children of either sex who are in easy circumstances must maintain their parents who are poor, whether or not the father is capable of working for his livelihood; but the claims of brothers, uncles and nephews

are dependent on the co-existence of both poverty and inability to work on their part, with easy circumstances on the part of the relative called upon to maintain them. The claim of poor females depends on their being unmarried, as they are not expected to work for their livelihood. In no case does any liability arise from relationship beyond the prohibited degrees.

Succession.

Part III of the Digest deals, practically, with the claims of a man's family to the whole or part of the property of which he died possessed; claims which are, of course, subject to the charge for decent burial and to the rights of creditors, and which are also subordinated more or less in all systems, but less in the Muhammadan than in most others, to the personal wishes of the deceased owner, expressed by will or death-bed gift. In most countries the Family has another formidable competitor, namely, the State. Bentham, indeed, considered that only the family in the narrower sense of the term, excluding first cousins and all beyond, had any moral claim at all as against the State, and that the right of the latter as compared with legatees was about equally balanced. The British Parliament has of late years gone a good way in Bentham's direction, not by limiting the possibilities of inheritance, but by cutting off larger and larger slices from the property to be inherited, more especially as against distant relations. The practice in some Muhammadan countries is for the Government to confiscate the entire savings of a deceased official. But in British India there are no death duties. The Government only charges a fee for services rendered in winding up the estate, and the option is allowed to Muhammadans, to Hindus except in certain cases, and now under a recent Act to Indian Christians, of escaping all post-obituary payments if the persons interested in the succession choose to take upon themselves the trouble of distribution and the increased risk of litigation. Hence the subject of

Administration.

to which Chapter VII of the Digest is devoted, is in British India an exceptionally complicated one. Account has to be taken both of the procedure to be followed when somebody applies in the regular English fashion to be appointed executor or administrator, and on the other hand of the rights and liabilities of the persons who may happen to be in possession of the whole or part of the assets, as heirs, as legatees, as (judicially uncertified) executors, or simply as creditors, where there has been no grant of probate or letters of administration. The principal British enactment, Act V of 1881, would have been more helpful had it clearly distinguished, and made separate provision for, these two very different situations; but it appears to have been originally drafted under the idea that application for probate or administration was to be obligatory in all cases, and to have been then by an afterthought rendered permissive in this respect, through a slight and almost unnoticed alteration in the wording of a single section, leaving all the rest of the Act unchanged, and leaving the Courts to unravel as best they might the resulting confusion.

Inheritance.

In Bentham's ideal Code, and in the French Civil Code, intestate comes before testamentary succession, on the ground that the property

of a dead person ought to be applied primarily to the support of those persons (if any) whom he was under some sort of obligation to support in his lifetime, and who would therefore be likely, *primâ facie*, to be losers by his death ; that the most general and obvious source of moral obligation, and of natural affection, is to be found in the constitution of the family, pointing to wife and children or grandchildren, then to parents or grandparents, then to brothers and sisters or their descendants ; and that the chief reason for allowing a (strictly limited) testamentary power was in order to meet exceptional conditions of merit or demerit, of need or affluence, known only to the testator.

Muhammadan Law is on this point in agreement with Bentham rather than with the English Law (reproduced in the Indian Succession Act), which allows a person to bequeath all his property to strangers, but goes considerably beyond Bentham's proposals in that it limits the power of bequest to one-third of the net assets. Thus two-thirds must in any case be distributed according to the rules of inheritance, unless there are no heirs at all claiming adversely to the legatees ; which is very unlikely to occur seeing that the Muhammadan Law of the Hanafi school reckons as possible heirs all blood-relations, male or female, however remote.

Nor have we here any such institution as the Hindu joint family, to obviate the necessity for distributing a dead man's property by treating him as only a co-parcener with others during his lifetime. Thus, although the Prophet is very unlikely to have uttered the saying attributed to him, that the laws of inheritance are one-half of useful knowledge, it is true that they have to be remembered and applied much more often than among either Englishmen or Hindus. It is also true that to master them in their entirety requires a very considerable effort of attention. They are simpler than the English Law in this one respect, that they make no distinction between movable and immovable property ; and simpler than the Hindu Law in that they do not distinguish property that is ancestral from what is self-acquired, nor do they differ (except in one small detail) according to the sex of the deceased owner. But the system makes up for these simplifications by other complexities peculiar to itself. Like the Roman Law on the same subject as presented in the Institutes of Justinian, before his final re-modelling of it in the Novels, the Hanafi scheme of succession is a haphazard compromise between the arrangements appropriate to a patriarchal society and those suitable to a well-policed empire, in which the law is strong enough to penetrate within the family, and to take account of the separate personality of every man, woman, and child. As in the matrimonial branch of the law, so here, the rights of women are quantitatively less than those of men, but similar in kind, and no less clearly defined. The emphatic condemnation, by the Prophet, of the primitive view that the wives and daughters of a dead man were a part of the property to be inherited, had for its natural corollary the principle that they should inherit some definite portion thereof. That proportion was fixed at one-half of the share assigned to the corresponding male. Thus, since the husband surviving his wife, or one of the wives, takes one-fourth of her unbequeathed property if she leaves issue, one-half if not, an eighth or a fourth is the share assigned in the corresponding cases to a single undivorced wife surviving her husband. Should there be two or more widows, this fraction has to be divided between them ; so that the share of one may chance to be only $\frac{1}{32}$, and that not necessarily of the whole property, but

it may be only of the two-thirds as to which a Moslem is compulsorily intestate.*

Similarly whatever falls to be divided, after satisfying other claims, among children of different sexes, or among brothers and sisters by the same father only, is apportioned on the principle that each male is to have twice as much as each female ; and the same proportion holds, in some though not in all cases, as between father and mother. It must not, however, be supposed that every female gets half what a male would have had in the same degree of consanguinity. Special rules, based directly or by analogy on Koranic texts, govern the cases of females standing alone in the nearer degrees, and beyond the degree of sister patriarchal usage prevails in all the Sunni schools to the extent of totally excluding females, and blood-relations of either sex connected with the deceased through females, so long as there is any male collateral, tracing up and down through an unbroken line of males—in other words any agnate, however remote. The same rule of exclusion, or postponement, applies generally even to near relations, such as a daughter's son or a mother's father, whose claim has to be traced through a female ; but exceptions are made in favour of a maternal grandmother, failing the mother, and also in favour of a half-brother or half-sister by the mother's side, who are allowed to take a share in certain contingencies, and who share equally, without any advantage to the male, when they share at all.

In marshalling the possible claimants to what remains after payments of debts and legacies according to the order in which their claims have to be considered, the Muhammadan lawyers distinguish the three principal grades by technical terms which are not perfectly apt in the original Arabic, and which become very much otherwise in the accepted English equivalents.

First come the *zawi 'l faraiz*, possessors by divine ordinance, called in English books "Sharers," being those to whom specific fractions of the estate are assigned by the Koran itself as conventionally interpreted. *E.g.* the Koran expressly commands that "if they (your children) be females only, and *more than two*, they shall have two-thirds of what the deceased shall leave ; and if there be one she shall have the half." The accepted Hanafi interpretation give two-thirds to be divided among *two or more* daughters, and makes "children" cover son's daughters (but not daughter's daughters) in default of actual daughters.

Next, *i.e.*, if there are no Sharers, or if the portions due to them do not exhaust the estate, come the *Asabah* (literally members of the kindred), called in English "Residuaries," a term which, like "Sharers," does not pretend to indicate the characteristic of the class, but only its position in the scheme of succession. The Arabic term is, of course, not meant to imply that the class of persons to whom it is opposed are not "kindred," but that those to whom it is applied claim to inherit simply as kindred, by virtue of unrepealed Pre-Islamite usage, or at best by virtue of some extra-Koranic tradition, and not as "possessors by divine ordinance,"

* On the other hand, the wife has usually something due to her on account of deferred dower, which, like an ordinary debt, takes precedence of all claims of inheritance, and in realising which she has an advantage over all other creditors through being on the spot, and able to retain possession of the assets until she is paid. Her *jahez* (the property which she brought to her husband's house), as well as all the presents which she received at any time, remain of course entirely her own ; and she may, subject to the consent of other inheritors, be a possible legatee of the one-third which her husband can dispose of by will. (See s. 272 of the Digest.)

though even this is not strictly accurate, because one very important rule relating to them, namely, that allowing females within certain degrees to share concurrently though not equally with males, is based directly on two texts of the Koran, and not on ancient usage.

Thirdly, if there were no Sharers and no Residuaries, Malik and Shafei declined to carry their genealogical researches any further, so that the residue escheated to the Public Treasury; but the Hanafi authorities * acted more in the spirit of the Roman Prætors, who took upon themselves, on failure of all agnates, to admit other blood-relations whom the ancient Code had ignored. The *zawi 'l arham* (possessors by virtue of the womb) should etymologically be those only whose claim depends, at some point or other in the chain, on relationship traced through a female; but they are defined in the Sirajiyyah as being all those who are neither *zawi ' l faraiz* nor *asabah*, and thus include the class of female agnates (*e.g.* brother's daughter), who in the course of Roman legal development were at one time classed among cognates but afterwards placed on a level with male agnates. The conventional English rendering, "Distant Kindred," is very wide indeed of the mark, seeing that they include persons so near in point of consanguinity as a daughter's son and a mother's father. The phrase must be taken to denote kindred whose chance of inheriting is distant, owing to the prejudice, or public policy, opposed to female succession.

The order of precedence among Residuaries *as such* (that is, apart from the additional claim that a near Residuary may have as Sharer) is in its broad outline the natural one, the reasons for which were long ago explained by Bentham; namely, I. descendants, II. ascendants, III. collaterals. But when we take into account the rights of parents as Sharers, the apparent preference of descendants disappears. "Ye know not whether your parents or your children are of more use to you," says the Koran: which supplements the considerations urged by Bentham; † and practical effect is given to this maxim by the text which specifies one-sixth as the primary, irreducible share of each parent. This will be exactly equal to the share of each son in the common case of a man leaving four sons, or to the mean between the share of a son and that of a daughter if he leaves two sons and two daughters; while if he leaves four daughters and no son, each of them will take as sharer $\frac{1}{4}$ of $\frac{2}{3} = \frac{1}{6}$, thus again producing the desired equality.

Though the main principle of precedence among Residuaries is as above, the conventional classification is not a threefold but a fourfold one; the third class consisting of brothers and sisters and their (male agnatic) descendants, and the fourth class of all the rest. It follows from this mode of classification that all descendants, however remote, of the parents must be exhausted before any inquiry is made for children of the grand-

* According to Ameer Ali ("History of the Saracens," p. 297), the credit of this reform belongs to the Caliph Mutazid b'illah (A.D. 892-902), who renounced the escheat on behalf of the Public Treasury.

† "Why to descendants before all others? 1st. *Superiority of affection.* Every other arrangement would be contrary to the inclination of the father. We love those better who depend upon us than those upon whom we depend. It is sweeter to govern than to obey. 2nd. *Superiority of need.* It is certain that our children cannot exist without us, or some one who fills our place. It is probable that our parents may exist without us, as they did exist before us" ("Theory of Legislation," p. 180). The Moslem doctors might retort here that the children may, as likely as not, be in the prime of life, and the parents decrepit, or that the children may be rebillious, but the parents' care and services are already in the past, and can never be nullified.

parents ; in other words, a great-nephew, or great-great-nephew, is preferred to an uncle ; and the same principle is applied in the fourth class in favour of descendants of grand-parents as against descendants of remoter ancestors, and so on ; contrary to the system of simply counting degrees of proximity through the common ancestor, which the Indian Succession Act has borrowed from the English Law of personal property, and that again from the Roman Law. The Hindu Law is, however, in agreement on this point with the Muhammadan. To a disciple of Bentham it will appear that as between remote collaterals none can be said to have a better moral claim than another, because none has any, except the State as the natural trustee of all ownerless things. The appeal is not to our sense of justice, but to our sense of symmetry, which is pretty well satisfied by either system. The truth is that these elaborate schemes of remote succession will generally be found to have their origin in times when the central power is either weak or tyrannical, and neither possesses nor deserves confidence as trustee for the community, though they are maintained in better times from force of habit ; and some passages in the Muhammadan law-books indicate that this was the prevalent feeling at the date of their compilation, and probably had been so at the time when these rules were taking shape.

On another point the Muhammadan Law is at variance both with the Hindu and with all modern European systems ; namely, that it adheres uncompromisingly throughout the whole scheme of succession to the principle that (1) among claimants similarly qualified the nearer degree excludes the more remote, and that (2) among those in the same degree the distribution is *per capita* and not *per stirpes ;* whereas all the other systems limit the application of these principles to collaterals, or to collaterals and ascendants, and apply to descendants the rule of distribution according to the stocks in both of its branches. Thus, in Muhammad's own case, his father Abdullah having predeceased him (in fact, having died before he was born) while the grandfather was still living, the other sons of the grandfather divided the whole of the latter's inheritance to his total exclusion, and he owed his maintenance and start in life to the kindness of one of his uncles. Such was the custom then in force, which presumably satisfied his sense of justice though he personally suffered by it, since he did not alter it when he had the power to do so : and such, consequently, is still the Muhammadan Law of all sects and schools. There is not quite the same unanimity as to the other branch of the rule ; but according to the Sunni schools the distribution among grandchildren or great-grand-children (those of them who inherit at all) is *per capita*, giving no advantage to the single child of one intermediate ancestor over the numerous progeny of another.

The same order of precedence, and the same principle of distribution *per capita*, are observed among " Distant Kindred " whenever they inherit at all, except that the application of the rule of the " double share to the male," where the intermediate links in the different pedigrees were some of them male and others female, gave rise, as we shall see, to some difference of opinion.

Lastly, it is interesting to note how the custom of polygamy makes itself felt in the rules regulating the succession of brothers and sisters of the half-blood. In monogamous systems, such questions only arise through re-marriage of widow or widower, as the case may be. In either case, according to modern English habits, in the latter case only according to

old Roman usage, the first and second families are commonly educated together, so far as difference of age will permit, in one and the same domestic circle and under the same double guardianship. Thus we find on the one hand the old Roman law concerning itself with kinship on the father's side only, placing the consanguine brother on the same level with the full brother and ignoring the uterine brother altogether; and we find on the other hand the English law imitating the latest Roman law in giving no preference at all to the whole blood over the half-blood on either side.

But in polygamous systems, such as the Muhammadan and Hindu, consanguine brothers are more often than not the sons of contemporary wives of the common father; as such they have been brought up in separate establishments, under distinct and not improbably hostile influences, so that, if presumed intimacy and affection be the ground of fraternal succession, there can be no doubt of the priority of the brother by the same father and mother over him who had the same father with the deceased but a different mother. And such is in fact the rule of both systems. As for the uterine brother, that is, the son of the same mother by a different father, the Hindu law cannot contemplate the possibility of his existence, disallowing as it does the re-marriage of widows: the Arabian usage before the Prophet, ignored him for a different reason, namely, that a widow re-marrying would leave her children behind her with the family of her first husband, so that they would see little or nothing of her children by the second husband; but a somewhat obscure verse of the Koran was understood to assign to the uterine brother (or sister) a one-sixth share (or one-third to two or more collectively) under the same circumstances as would entitle the full brother and sister to the residue. (Art. 221 of the Digest.)

On the whole, the scheme of succession above outlined, and explained in detail in Chapter VIII of the Digest, is not ill-adapted to the family life which the matrimonial law deals with, especially when read in connection with the provisions as to guardianship and maintenance. It must be remembered, however, that what has been here described is not quite the whole system as developed by the Arabian jurists.

One half-section of the Sirajiyah has become inoperative in British India in consequence of the abolition of slavery; namely, that treating of the succession of the former master or his heirs to the estate of a freedman who left no "heirs" in the stricter sense of the term, that is, no Sharers or (consanguineous) Residuaries. Such inheritors were called "Residuaries for special cause."

The rule that a non-Muhammadan cannot be heir to a Muhammadan, or *vice-versâ*, has been abolished by Act XXI of 1850.

The learning respecting "successors by contract" (see s. 262 of the Digest) has become nearly, if not quite, useless since the abolition of retaliation and composition for homicide took away the principal motive for making such contracts.

The *Bait ul Mal*, the ancient public treasury for religious war and other purely Muhammadan purposes, has given place, as the recipient of escheats, to the Government of India. Whether, in the event of there being a properly administered religious Fund belonging to the British Indian Muhammadan community, or a recognised portion of the community, it could be recognised as succeeding to the claims of the *Bait ul Mal* in this respect, is a speculative question which we need not consider in

this place. Such a claim to escheat has been suggested by the Khoja *jamat*, but not adjudicated upon. (See p. 37 *ante*.)

Certain rules as to missing persons and cases of pregnancy given in the Sirajiyah as part of the law of inheritance have been rightly held to be mere rules of evidence, and as such outside the sphere of Anglo-Muhammadan Law.

And, lastly, all the remaining subject-matters of Anglo-Muhammadan Law are capable of being regarded either as outworks of the law of inheritance, intended to prevent undue encroachments on its province, or else as palliatives of incidental mischiefs likely to ensue from its too uncontrolled operation. Both aspects suggest themselves in connection with the law of

Wills and Death-bed Gifts.

The one-third limit has been already noticed. That a man should be allowed to bequeath anything away from the legal heirs may no doubt be described as a curtailment of the province of inheritance ; but a testamentary power, co-extensive with the power of alienation *inter vivos*, appears to most Englishmen so natural, that when they find the latter permitted and the former prohibited as to two-thirds of a man's property, they will be likely to think that the legislator must have been remarkably proud of his scheme of succession, and specially distrustful of the wisdom of testators ; still more so when they find that even the bequeathable third must not be so used as to alter the ordained apportionment among those who actually inherit. Thus a Mussulman may redress the kind of hardship suffered by the Prophet himself by bequeathing a third of his property to the son of a deceased son, who would be excluded by his uncles from all share of the inheritance ; but he may not employ his testamentary power to equalise the shares of his male and female children, unless the sons give their consent to the arrangement ; and that consent must be given or confirmed after his death, when they are no longer amenable to his influence. By way of guarding against evasion of these stringent regulations it is laid down that a death-bed gift (even if professedly irrevocable) is subject to the same restrictions as a legacy, and evidence is admitted that a sale by a dying man was for inadequate consideration, and therefore, in part, a death-bed gift. But they shrank from the impiety of admitting evidence to contradict the acknowledgment of a debt by a dying man, thinking it better to leave a loophole for unscrupulous men to cheat their heirs occasionally, than to run the slightest risk of the deceased being brought to shame at the Day of Judgment through being prevented from paying his just debts.*

Gifts.

Part IV of the Digest is entitled " Alienation," and may seem at first sight to have little connection with family relations. But it will be seen from the headings of the chapters that only three special topics connected with alienation of property—perhaps we ought to say, three sets of provisions in restraint of alienation—come within the range of Anglo-Muhammadan Law, while alienation in general is regulated for all persons alike

* " If it should be established that a man should be killed in the cause of God, after that should come to life, and this be repeated thrice over, whilst in debt, he would not enter into paradise until after paying his debts."—From the " Mishcat."

by the Contract Act, the Transfer of Property Act, and other Anglo-Indian Codes. The Chapter on Gifts will be found to consist chiefly of restraints on gratuitous transfer, differing, where they differ at all, from those imposed by English Law in the direction of greater strictness. A gift is invalid if it is not completed by actual delivery; if the donee is unborn, or if for any other reason its effect is postponed to a future date; if it is a share in joint property; if it is made to two persons jointly; and even if valid when made, it is capable in some cases of being revoked. On the other hand, if the donor affects to impose conditions inconsistent with full ownership, the gift is good, but the conditions are void. Thus the policy underlying this branch of the law seems to be, to take care that the only gifts recognised shall be simple and genuine transactions, for the most part perhaps in the nature of complimentary presents or tokens of personal affection, and that this machinery at all events shall not be used to divert large masses of property permanently into channels different from those indicated by the law of inheritance; though, naturally, the desire to place obstacles in the way of sham gifts in fraud of creditors may also have had its share of influence.

Wakf.

All the more strange is it to find the very opposite policy apparently inspiring a closely related branch of the Muhammadan Law of property. In all the various enactments defining the range of the personal laws in India, the list concludes with "any religious usage or institution"; an expression which has at times puzzled the Courts not a little, seeing that all the laws which the Legislature has reserved for Hindus and Muhammadans, respectively, by express words (such as those relating to marriage and succession) are in their view religious laws; and equally religious in their view are their own laws of contract, crime, evidence, and so forth, which the Courts are not expected to recognise. But whatever doubts might arise on other points, it was never disputed that the dedication of property to such a purpose as the building and maintenance of a mosque was a religious usage; and where it was found that the Muhammadan Law-books discussed under the same technical heading, and regulated in much the same manner, endowments for worship and endowments for roads, bridges, caravan-serais, poor relief, and other philanthropic objects, defining, moreover, the technical term covering both kinds of endowments as "a dedication of property to Almighty God in such a way that it may be of use to mankind," it was impossible to doubt that *wakf* generally must be recognised by the Courts as a transaction governed as between Muhammadans by Muhammadan Law. So far there was never any difficulty; but trouble arose when case after case raised the question whether the term *wakf* was also meant to cover dispositions in the nature of entail or private settlement. On one side it was urged that to admit the validity of such private perpetuities would be contrary to the spirit of the Muhammadan Law of gifts, and inconsistent with the jealous watchfulness displayed in other ways against any attempt to evade the rules of inheritance; though why more so than the religious and charitable perpetuities, which were undisputed, was not explained. On the other side it was pointed out that the practice in question is expressly recognised in all the standard text-books except one, which is not adverse, but simply silent, and that in the view of the Prophet (as pictured by the traditionists) to provide for the comfort and dignity of one's own family is quite as much an act

of piety, quite as genuine a form of almsgiving, as to provide for the poor in general. Since the passing of the Mussalman *Wakf* Validating Act (VI of 1913), on the 7th March, 1913, the validity of *wakfs* in favour of families, children, and descendants and (in the case of Hanafis) also for the maintenance and support of the person creating the *wakf*, and for the payment of his debts, has been expressly recognised, provided that the ultimate benefit is reserved for a religious, pious, or charitable purpose of a permanent character. The Act is declaratory, but it has been held not to apply to *wakfs* created before the 7th March, 1913, though the litigation may arise subsequent to that date.

Pre-emption.

Lastly, the inconveniences resulting from the minute sub-division of land under the rules of inheritance are mitigated in practice, or are at least supposed to be mitigated, by the custom of pre-emption, according to which, if a person has contracted to sell to a stranger his interest in a piece of land or a house, the benefit of the contract may be claimed, on tender of the price agreed upon, by (1) any one who is joint owner with the vendor of the property in question, or, in default of such, by (2) any one who can show that he is jointly interested in easements connected with the land or house, as (*e.g.*) having a right to use a road passing both properties and not open to the general public, or to irrigate from an adjoining stream; or in the last resort by (3) a mere neighbour. Of course the joint owners here referred to are usually co-heirs of the original acquirer, who chose to go on occupying jointly after his death in order to avoid the worry and inconvenience of the division prescribed by law; and the neighbours are very frequently *quondam* co-heirs who have carried out the partition, but whose separate plots of land are so interlaced that life would be intolerable but for various little mutual concessions and arrangements which would be disturbed by the intrusion of a stranger purchaser. But whether on the whole, considering the many openings it gives for misunderstanding and disputes, the rule does more to preserve or to disturb the peace of families, seems to be a matter of dispute among experts. Of the rulings noted in this work, about 17 per cent. relate to pre-emption; and the number might have been doubled had cases arising under the Panjab and Oudh Acts, or under local records of right (*wajib-ul-arz*) been included.

Peculiarities of the School of Shafei.

In Part V of the Digest are noted all the points of difference that I have been able to discover within the range of Anglo-Muhammadan Law, differentiating Shafeites and Shias, respectively, from the far more numerous followers of Abu Hanifa. Of the Shafeite variations the most important are the following:—

1st. Women have less freedom of choice in the matter of marriage. Not only female minors, but adult women who are virgins, may be disposed of in marriage by the father or paternal grandfather without their consent, and though widows and divorced women cannot be given in marriage against their will, even they cannot re-marry without the intervention of a guardian.

2nd. Shafeism is also less favourable to women in the matter of inheritance. Shafei himself ignored the "Distant Kindred" altogether,

and considered that in default of "Residuaries" the property should escheat to the Bait ul Mal. But it seems that his followers in modern times have so far come round to the Hanafi view as to admit other blood relations on failure of "heirs" properly so called, though they arrange them in an order rather more favourable to the male sex. There is nothing to show at what date the change of practice took place, but in all probability it was due to a growing suspicion, of which there are plain traces in the Hedaya and elsewhere, that the money coming into the Bait ul Mal was no longer applied *bonâ fide* to the promotion of the true faith, so that its replenishment was no longer an object of interest to good Mussulmans; or, to put the same thing in another way, to a growing antipathy between the professional expositors of the Sacred Law and the spending departments of most Muhammadan Governments of the day.

3rd. Of the three grounds of pre-emption recognised by the Hanafi school, only the first, namely co-ownership, is admitted by Shafei; not that of participation in easements, and still less that of mere contiguity.

Lastly, as regards the vexed question of *wakfs* in favour of descendants, the view opposed to Privy Council decisions for the period prior to 1913, is even more strongly supported by the Shafeite than by the Hanafi authorities.

Shia Law.

The divergence here is, as might be expected, much wider, and generally, though not invariably, in the opposite direction from the Shafeite variations.

In matrimonial law there is one radical departure from the teaching of the four orthodox schools, *viz.* the legal recognition of *temporary marriages;* that is, of connections not merely terminable at any time by the will of the husband, but coming to an end automatically by the terms of the contract at the expiration of a fixed, and sometimes a very short, period, unless renewed by the consent of both parties. It is noteworthy that Al Mamun, the one Abbasside Caliph who made an attempt to reconcile the dynastic claims of his own branch with those of the Aliites, was also the one Caliph who tried (unsuccessfully) to induce the orthodox Ulama to admit the legality of those *muta* marriages. But without knowing the date at which this became accepted Shia law, it is impossible to say whether Mamun influenced the Shia doctors, or they influenced him, or whether it was a mere coincidence. The spirit of the innovation—or recurrence to old Arab practice—will be missed unless it is remembered that if such unions were not a species of *nikah* (legalised union) they must be *zina*, entailing either corporal or capital punishment. It is probable that the sterner Sunni view, while not appreciably improving the position of the (so-called) permanent wife, was really the more detrimental to morality in the larger sense of the term, by intensifying the demand for slave concubines, and consequently for a brisk slave-trade, and for large slave-catching expeditions, and at the same time enlarging the opportunities for police oppression and blackmail.

The *muta* consort is expressly declared not to be a wife for the purpose of mutual inheritance, unless there is an express stipulation to that effect; but the children are affiliated for all purposes to both parents, apparently without the formality of acknowledgment by the father, which is necessary for the legitimation of his children by a slave concubine.

The Shia Law is not more favourable than the Sunni to the personal rights of women, and indeed in one or two points, it is rather less favourable; but in the matter of inheritance the dynastic claims of the descendants of Fatima * led naturally, if not quite necessarily, to their insisting that a daughter's son must have as good a place in the scheme of succession to private property as could be reconciled with the Koran. In face of the text, "God hath commanded you concerning your children, that a male shall have as much as the share of two females," it was impossible to put the daughter on an equality with the son, and therefore practically impossible to let the daughter's son share equally with a son's son; but it was arguable that the son of a deceased daughter ought to inherit whatever his mother would have inherited had she survived the proprietor, and the admission of this right carried with it logically a reconstruction of the whole Table of Inheritance on the principle of representation or distribution *per stirpes*, combined with the principle of making no distinction between male and female lines of descent, and no distinction, except the double share to the male, between male and female claimants in the same line of descent.

It is natural to conjecture that these principles may have found readier acceptance in some quarters through their partial conformity with the law of the Eastern Roman Empire as re-modelled by Justinian, considering how large a number of converts to Islam, and tributary subjects, must have been familiar with that law.† But it is quite as likely that support would be obtained from a section of the Arabs themselves, if Robertson Smith is correct in his opinion that social conditions tending to make relationship traced through females more important than agenatic kinship had been widely prevalent in Arabia not very long before the time of Muhammad, and were still to be found in some tribes. (Kinship and Marriage in Early Arabia, ed. 1885, p. 95.)

There was yet one other point in which the Legitimist politics of the Shias influenced their scheme of intestate succession. Such a law of primogeniture as still governs the descent of real property in England would have been quite out of place in a system which did not originally contemplate any private ownership of land at all by members of the ruling Arab race. But some such rule was indispensable for the devolution of the Imamate if, as they contended, the leadership of Islam ought always to be vested in a single person by hereditary right. A custom, likely enough to be spontaneously observed in many families, of allowing the eldest son to retain his father's wearing apparel, ring, sword, and Koran, while the rest of the property was equally divided, was naturally laid hold of, and insisted upon as a matter of positive obligation, in order to strengthen the sentiment in favour of adopting an analogous rule for the primacy of the vast brotherhood of Islam. But as the holy Jaafar us-Sadiq, according to the belief of the Twelve-Imam Shias, disinherited his eldest son for unseemly conduct, it was declared in their rules of inheritance that the eldest son should take the articles above mentioned only "if not prodigal and deficient in understanding."

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* See pp. 8 and 20, *ante*.

† Supposing the rules laid down in the Novels to have been generally observed in actual practice at the time of the Saracen conquests, as to which there may be some room for doubt.

Under the head of Wills the Shia lawyers show themselves somewhat less strict than the Sunnis in safeguarding the rights of heirs ; and in treating of gifts they make no objection to *mushaa* (gift of an undivided share), nor to a thing being given to two persons jointly.

As regards the *wakf* controversy above noticed, the Shia lawyers are so far from agreeing with the Privy Council law as applied to *wakfs* created before the Mussalman *Wakf* Validating Act, 1913, came into force, that "the primary object of a *wakf* must be some public and unfailing purpose," as to use language implying that *wakfs* in favour of determinate individuals are the rule, to which dedications for public objects are exceptions. In some other respects they are stricter than the Sunnis, as, for instance, in requiring the *wakif* (founder) to divest himself, not only of full ownership but of everything in the nature of usufruct.

Lastly, the Shia Law agrees substantially with the school of Shafei in limiting the right of pre-emption to co-sharers in the land sold ; while it is peculiar in not allowing it even then, if the number of co-sharers exceeds two.

As regards the somewhat nebulous *Motazila Law*, see Chapter XV of the Digest.

DIGEST OF ANGLO-MUHAMMADAN LAW.

DIGEST OF

ANGLO-MUHAMMADAN LAW.

PART [AND CHAPTER] I.

PRELIMINARY; TOPICS, PERSONS, AND SOURCES.

"We will that, generally, in framing and administering the law, due regard be paid to the ancient rights, usages, and customs of India" (*Queen's Proclamation*, 1858, *to the Princes, Chiefs, and People of India*).

"The Court, judicially administering the law, cannot say that one religion is better than another." *Hokoond Lall Singh* [25 Cal. 885 (1898), per Meclean, C.J.].

This chapter treats chiefly of the rules for determining in what cases, to what persons, and in which of its different shapes, Anglo-Muhammadan Law is applicable, and the relative authority of the sources from which, when applicable, it is to be ascertained.

Topics of A.M.L. in Bengal, &c.

1. The following provision applies to the territories for the time being respectively administered by the Governor of Bengal, by the Lieutenant-Governor of Behar and Orissa, by the Lieutenant-Governor of the United Provinces, and by the Chief Commissioner of Assam, except such portions of those territories as for the time being are not subject (*e.g.*, Oudh) to the ordinary civil jurisdiction of the High Courts :—

"Where in any suit or other proceeding it is necessary for a civil court to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Muhammadan Law in cases where the parties are Muhammadan, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

"In cases not provided for by the above clause, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience."

Bengal, N.W.P., and Assam Civil Courts Act, 1887, s. 37, as read with the Bengal and Assam Laws Act, 1905, ss. 2 and 3, and the Acts of 1912 giving effect to the new partition announced by the King-Emperor at the Delhi Durbar, 1911. The exception covers the whole province of Oudh (as to which see s. 7, *post*), the territory lately transferred from the Central Provinces to Bengal, and (apparently) the town of Calcutta (s. 3); the original civil jurisdiction of the High Courts in the Presidency towns being derived from a different source, and governed by different rules, from their ordinary civil jurisdiction (mainly appellate) in the Mufassal.

"We are not at liberty to substitute, for the express rules of Muhammadan Law, as expounded by the best authorities, that which, according to our opinion, might be a more enlightened and proper rule of law"; Jackson, J., in *Ibrahim Mulla*, 12 W. R., 460 (1869); s.c. 4 B. L. R., (A. C.) 13. The rule that the Court felt itself obliged to enforce in this case was, that a divorce pronounced in due form by the husband is none the less valid because induced by compulsion of threats. See s. 64, *post*.

The enumeration of legal topics—"succession, inheritance, marriage, or caste, or any religious usage or institution"—has been handed down through successive re-enactments from the original Regulation framed in 1772 by Warren Hastings for the Bengal Mufassal.

The words "or caste" must be taken as applying only to Hindus. If we find, anywhere among Indian Muhammadans, bodies more or less resembling Hindu castes in structure and exclusiveness, that is a matter of local usage entirely unsupported by their sacred law. Even in the case of Khojas, whose organisation approaches most nearly to that of a Hindu caste, a marriage between a Khoja and a non-Khoja is apparently legal if it is legal under Muhammadan Law, and no penalties in the matter of inheritance or succession would apparently be enforced by the Courts.

The words "any religious usage or institution" mean apparently "any usage or institution connected with religious ceremonies." All laws which Muhammadans acknowledge to be binding on them as such are religious in the sense of being attributed to a divine origin, so that to employ the term in that sense would be to nullify the preceding specification of particular topics, and to extend the range of personal as opposed to territorial law indefinitely. The opinions now and then expressed by individual judges in favour of the wider interpretation—*e.g.* by Mahmood, J., in *Gobind Dayal*, 7 All. 775 (1885), at p. 779—have never been allowed to prevail.

Justice, Equity, and Good Conscience.—"Our Courts are to be guided by the principles of justice, equity, and good conscience. The Muhammadan Law is only the law of this country in so far as the Legislature has adopted it as the law of British India, and so far as we see clear authorities in it on a particular point. In all cases, therefore, where there is no clear and positive authority in the Muhammadan Law, I think it is our duty to follow the dictates of justice and good conscience;" *per* Mookerjee, J., in *Braja Kishor Surma*, 7 B. L. R., at p. 25 (1871).

Observe that this Act, unlike the corresponding enactments for other parts of India, makes no provision for recognition of special customs at variance with the general rules of the religious law to which the parties are subject. The law of Islam is less indulgent to such variations than the Hindu Law,* and accordingly the Courts of these provinces, in default of express legislative sanction, have generally been adverse to the retention of Hindu civil usages

* See, however, Abdur Rahim, Muhammadan Jurisprudence, p. 136, where it is said that custom overrides analogical law, though it must not be opposed to a clear text of the Kōran, or an authentic tradition.

(*e.g.* rules of inheritance) by families professing to be Muhammadan, while they have not been called upon to deal with any cases, similar to those of the Khojas and Memons in Western India, of practically immemorial usage observed by a considerable community. See *Surmust Khan*, Agra, F. B., 38 (1866), following a *dictum* of the Privy Council in *Jowala Buksh*, 10 Moo. I. A., 511 (1866), at p. 538 ; *Sarupi* v. *Mukh Ram*, 2 N. W., 227 ; *Hakim Khan*, 10 C. L. R., 603 (1882), expressly dissenting from the view expressed by one of the judges in *Rup Chand Chowdhry*, 3 C. L. R., 97 (1878) ; *Jammya*, 23 All., 20 (1900).

As to diversities of sects and schools, see s. 13.

1. This is subject to the exception in favour of Oudh, for which see s. 7 below.

2. Enactments corresponding with the above are in force in all the territories for the time being under the government of the Governor of Fort St. George (Madras) in Council, except the tracts respectively under the jurisdiction of the Agents for Ganjam and Vizagapatam ;[1] and also in Burma ;[2] the only differences being that

In the Madras Mufassal, and in Burma.

(1) In the Madras Act, after the words " where the parties are Hindus," the following sub-clause is inserted : " (*b*) *any custom* (*if such there be*) *having the force of law, and governing the parties or property concerned ;* "[3]

(2) That in the Burma Laws Act, after the words " except in so far as such law has, by legislative enactment, been altered or abolished," we read, " or is opposed to any custom having the force of law ; "[4]

(3) That in Burma the Buddhist Law has been put on the same level with Muhammadan and Hindu Law.[5]

[1] Madras Civil Courts Act, 1873, s. 16.

[2] Burma Laws Act, 1898, s. 13.

[3] From the fact that, in the Madras Act, custom only comes in for mention *after* Muhammadan and Hindu Law, and in a separate sub-clause, it might naturally have been inferred that it could only be the rule of decision where the parties were neither Muhammadans nor Hindus ; but the Courts have always construed it as allowing a clearly proved custom to supersede *pro tanto* the religious law by which the parties are in other respects governed. See *Kunhi Bivi*, 6 Mad., 103 (1882) ; *Ammutti*, 8 Mad., 452 (1885) ; *Assan* v. *Pathumma*, 22 Mad., 494 (1897) ; *Kunhimbi Umma*, 27 Mad., 77 (1903). All four cases related to the Mapillas, or Moplas, of Malabar. The first, third, and fourth turned on the local custom, called *Marumakatayyam*, of tracing the line through sister's sons, and forming joint families on that basis. In *Mirabivi*, 8 Mad., 464 (1885), an alleged custom to exclude daughters from inheritance, where there are sons, was found to be a mere practice, more or less common, not consciously accepted as having the force of law. Some of the Moplas are governed by Muhammadan Law, as in *Pakrichi*, 36 Mad., 385 (1911).

[4] In Burma we have a statutory enactment of the rule which was evolved by judicial interpretation in Madras, that a clearly proved custom having the force of law overrides a provision of the religious law.

[5] Burma Laws Act, as above.

In the Presidency Towns.

3[1]. In the Presidency Towns of Calcutta, Madras, and Bombay the rule for the exercise by the Chartered High Courts of their original civil jurisdiction, and also for the Presidency Small Cause Courts,[2] is that in disputes between the native inhabitants "their succession and inheritance to lands, rents, and goods[and all matters of contract and dealing between party and party][3] shall be determined, in the case of Muhammadans, by the laws and usages of Muhammadans" [or, in Madras and Bombay, "by such laws and usages as the same would have been determined by if the suit had been brought in a native court"];[4] and where only one of the parties shall be a Muhammadan, by the laws and usages of the defendant.[5]

[1] Statutes 21 Geo. III, c. 70, ss. 3—17, (1781) for Calcutta, and 37 Geo. III, c. 142, ss. 3—13, read with 39 and 40 Geo. III, c. 79, s. 5, and 4 Geo. IV, c. 71, s. 9, for Madras and Bombay, omitting words no longer applicable.

[2] Act XV of 1882, s. 16.

[3] The combined effect of the rulings in two Hindu cases is that occasions *may* arise for the application of Hindu or Muhammadan Contract Law within the town of Calcutta, but only on such points (if any) as are not covered by the Indian Contract Act or some other enactment of the Indian Legislature. In *Madhub Chunder Poramanick*, 14 B. L. R., 76 (1876), and 22 W. R., 370, it was held that an agreement which would be void as in restraint of trade under s. 27 of the Contract Act could not be supported as valid by Hindu Law; while on the other hand in *Nobin Chunder*, 14 Cal., 781 (1887), effect was given to the Hindu rule of Damdupat, limiting the interest recoverable at any one time to the amount of principal; the Court considering that it did not conflict with Act XXVIII of 1855, which repeals in general terms all laws in restraint of usury, and not having been asked to consider its consistency with s. 10 of the Contract Act. No similar question can arise between Muhammadans, whose law does not leave to the judge any middle course between strictly enforcing the absolute prohibition against all taking of interest and treating it as a merely moral obligation. The latter course was rendered imperative by Act XXVIII of 1855, but had been the practice of the British Courts long before that, and apparently of their Muhammadan predecessors. See *Mia Khan*, 5 B. L. R., 500 (1870), followed at Allahabad in *Hamira Bibi*, 32 All., 182 (1910). In the same case, however, on appeal to the Privy Council, their Lordships held that compensation to a Muhammadan widow in lawful possession of her husband's property, as against his heirs, for forbearing to insist on her right to the dower debt, can best be calculated on the basis of an equitable rate of interest: *Hamira Bibi*, L. R., 43 I. A., 294 (1916). See, also, below s. 162 and note 1.

[4] As to usages at variance with the Muhammadan Law, practised immemorially by professedly Muhammadan communities, see the Khoja and Memon cases, described at length in the Introduction, p. 37, *ante*.

[5] "*Laws and Usages of the Defendant.*"—With respect to this test the following remarks were made by the Madras High Court in *Azim-un-nissa Begum* v. *Dale*, 6 Mad. H. C., 455 (1871); "That does not mean that whenever the defendant in a suit is a European British subject no law but the law of England shall be applied to ascertain the validity of any past transaction which may be brought under consideration in the suit. Its only effect, I apprehend, is this, that when a dealing * takes place between two parties, one of whom only is a Muhammadan, and the suit is brought in respect of that transaction, the dispute *between those parties* is to be decided according to the law of the defendant." In that case the "dealing" was an alleged gift by a Muhammadan husband to his Muhammadan wife; but the "dispute" which the Court was called upon to determine was between the wife (after the husband's death) and the European official who happened, under the peculiar circumstances of the case, to be charged with some of the functions of an administrator to the husband's estate. The Court held in effect that the law to be applied was the same as would have been applicable as between the parties to the original "dealing" out of which the dispute arose, that is, the Muhammadan Law. See also *Ali Saheb*, 21 Bom., 85 (1895).

The corresponding question respecting Hindu Law was incidentally discussed by the Bombay High Court in *Lakshmandas*, 6 Bom., 168 (1880), at p. 183, with reference to the same expression, "law of the defendant," as used in Bombay (Mufassal) Reg. IV of 1827, s. 26, and by the Calcutta High Court *Sarkies* v. *Prosonomoyee*, 6 Cal., 794 (1881), at p. 805, with reference to s. 17 of 21 Geo. III, c. 70, and in both cases the view expressed was substantially the same as at Madras. In the latter case Garth, C. J., said: "It may not be very easy to define what the concluding words of the section really mean, but whatever their proper construction may be, it is clear that they do not mean this, that where a Hindu purchases land from a European, in which the vendor has only a limited interest, the Hindu purchaser is to be in any better position as regards his purchase than a European purchaser would be. If the plaintiff's husband had no power to defeat her right by selling his land to a European, it is clear to me that he had no power to do so by selling his land to a Hindu or Muhammadan." And see West and Buhler's "Digest of Hindu Law," p. 6.

Though the enactments embodied in the text make no express provision for the application of the native personal laws to questions relating to marriage within the Presidency Towns, they have always been so applied in practice, and so far as Muhammadan Law is concerned there is no doubt as to marriage being "a matter of contract." See *ante*, pp. 30, 31

4. The Muhammadan Law of Gifts, though not expressly mentioned in the enactments referred to in sections 1 and 2, has, nevertheless, been treated by the Courts as supplying the rule for determination of suits between Muhammadans in Bengal,[1] in the North-West Provinces[2] (now the Province of Agra in the United Provinces of Agra and Oudh), and in the Madras Presidency,[3] and these judicial decisions have now been indirectly confirmed by the Indian Legislature.[4] Gifts.

[1] *Zohoorooddeen* v. *Baharoolla*, 6 W. R., 185 (1864).

*Referring to the words "matters of contract and dealing between party and party" in the original Act.

2 *Shumsoolnissa* v. *Zohra*, 6 N. W., 2 (1873). Here, as in some other cases turning on the same point, the judges disagreed as to the reasons for their joint conclusion.

3 *Chekkonekutti*, 10 Mad., 196 (1886) ; *Khader Hussain*, 5 Mad. H. C., 114 (1870).

4 Section 129 of the Transfer of Property Act, 1882, declares that " nothing in the Chapter on Gifts shall be deemed to affect any rule of Muhammadan Law " ; and inasmuch as Lower Bengal, the North-West Provinces, and Oudh (now the United Provinces of Agra and Oudh), and the Madras Presidency constituted by far the most important part of the territories which the Act applied in the first instance, it may be inferred that *some* rules of the Muhammadan Law respecting gifts were supposed to be in force at that date in those territories.* The observations of Benson, J., in *Alabi Koya*, 24 Mad., 51 (1901) to the effect that the Muhammadan Law as to gifts was only applicable in the Madras Presidency as a matter of " justice, equity, and good conscience," and that it was not equitable to apply either the Muhammadan doctrine of *Mushaa* or the Muhammadan rules as to delivery of possession where the gift was duly registered under the Transfer of Property Act, were disapproved in a later case before the same Court. *Vahazullah*, 30 Mad., 519 (1906).

In the Panjab, and N. W. Frontier.

5. In the Panjab and the North-West Frontier Province the range of application of Anglo-Muhammadan Law is limited as follows :—[1]

" In questions regarding succession [special property of females] betrothal, marriage, divorce, dower [adoption] . . . guardianship,[2] minority,[3] bastardy,[4] family relations, wills, legacies, gifts, partition, or any religious usage, or institution, the rule of decision shall be this :—

(1) Any custom applicable to the parties concerned, which is not contrary to justice, equity, or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by competent authority.

(2) The Muhammadan Law in cases where the parties are Muhammadans [and the Hindu Law in cases where the parties are Hindus], except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to.[5] In cases not otherwise specially provided for,

* The Bombay Presidency, the Panjab, and Burma were excepted from this Act in the first instance, power being reserved for the local Governments to adopt it if and when they should think fit. The local Governments have since extended the Act to the Bombay Presidency and in Burma, to the Towns of Rangoon, Moulmein, Bassein, and Akyab : also some of the sections to Lower Burma generally.

the judges shall decide according to justice, equity, and good conscience."

[1] The Panjab Laws Act, IV of 1872, s. 5, as amended by Act XII of 1878, and for the N.W. Frontier, Reg. VII of 1901. "Special property of females" and "Adoption" are institutions of Hindu, not of Muhammadan, Law; but apparently any custom relating to these matters, if found among the Muhammadans in these territories, and satisfying the conditions laid down in clause (1), would be enforced, in spite of the religious law.

[2] So far as not regulated by the Guardians and Wards Act, 1890. See Chap. V, *post*.

[3] So far only as it affects marriage, dower, or divorce. For other purposes the age of majority has now been fixed by the Legislature. See Chap. V.

[4] So far only as the question, whether So-and-So is a bastard, appears to the Court to be one of substantive law rather than of evidence. See ss. 81—88 of this Digest.

[5] See, for instance, *Mahammad Azmat* v. *Lalli Begum*, 8 Cal., 422, and L. R., 9 I. A., 8 (1881), where it was found that by the custom of a particular family of professed Muhammadans, widows were not allowed to inherit as Sharers, and this finding was accepted by the Chief Court of the Panjab, and ultimately by the Privy Council. In several other cases the Chief Court of the Panjab has recognised, as widely prevalent among Muhammadan landholders, a custom that widows should take, as by Hindu Law, a life-estate in the whole property instead of the specific portion which they would inherit absolutely according to the Muhammadan Law; Boulnois and Rattigan, "Panjab Customary Law," p. 97; Rattigan's "Digest," 6th ed., p. 20. similarly the Kabyles of Algeria retain non-Islamic usages, formally embodied in written "Kanouns," and guaranteed to them by treaty with the French Government, one of which is the denial of all rights of inheritance to women; also, apparently, the Kabyle law prevents a woman from dissolving marriage by Khula (Clavel Revue, p. 228). But, on the other hand, in *Ghasiti* v. *Umrao*, 21 Cal., 149, and L. R., 20 I. A, 108 (1893), the Privy Council upheld the decision of the Panjab Court refusing to recognise a custom among a Muhammadan community or tribe called Kanchans for a family to be maintained as a joint family out of the wages of prostitution earned by the female members, and to recruit itself on the female side by adoption. The principle of this decision appears to be that customs which are immoral according to British notions can only be recognised, if at all, on clear proof that they are not immoral according to the general principles of the religion professed by the body of persons seeking to maintain the custom; and that, whatever might be said as to the attitude of the Hindu religion towards certain forms of prostitution (see *Mathura Naikin*, 4 Bom., 545 (1880), and *contra*, *Venku* v. *Mahalinga*, 11 Mad., 393 (1888), it is clear that "as regards Muhammadans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws."

Arains residing in Lahore City, who own land in the neighbourhood of the city and depend for their living entirely upon agriculture are in matters of succession governed by agricultural custom and not by Muhammadan Law: *Muhammad Din* v. *Ahmad Din*, 50 Panj. Rec. 136 (1915). So *Gul farosh* Arains of Lahore, though ordinarily following Muhammadan Law, follow custom in regard to wills: *Rahim Bakhsh* v. *Umar Din*, 50 Panj. Rec., 226 (1915).

5A. In British Baluchistan, in questions regarding succession, inheritance, pre-emption, marriage or caste, or

In British Baluchistan.

any religious usage or institution, the Muhammadan Law shall form the rule of decision where the parties are Muhammadans . . . except in so far as that law has been altered or abolished by legislative enactment, or is opposed to any custom having the force of law in British Baluchistan. In cases not otherwise provided for, the Court shall act according to justice, equity, and good conscience.

British Baluchistan Civil Justice Regulation, IX of 1896, s. 89. Custom would therefore override Muhammadan Law.

In the Central Provinces.

6. The same rule is laid down for the Central Provinces, as for the Punjab and the North West Frontier Provinces, except that

(*a*) Divorce is not expressly mentioned among the reserved topics, though presumably included under marriage ; and that

(*b*) The Muhammadan Law (or the Hindu Law, as the case may be) is referred to as the primary rule of decision and the authority of custom is only saved by a proviso to the effect that " when among any class or body of persons, or among the members of any family, any custom prevails which is inconsistent with the law applicable between such persons under this section, and which, if not inconsistent with such law, would have been given effect to as legally binding, such custom shall, notwithstanding anything herein contained, be given effect to."

The Central Provinces Laws Act, 1875, s. 5.

In Oudh.

7. In the province of Oudh the rule is the same as in the Panjab.

The Oudh Laws Act, 1876, s. 3. Hence in *Mahomed Riasut Ali*, 21 Cal., 157 (1893), a case from Oudh, the Privy Council recognised a local custom for Muhammadan widows to take a life-interest, in equal shares, in the whole of the immoveable property left by their deceased husband ; whereas the High Court had, in 1871, ruled to the contrary for the adjoining N. W. Provinces (now the Province of Agra) ; *Sarupi* v. *Mukh Ram*, 2 N. W., 227. And again in *Hub Ali*, 28 All., 496 (1900), an alleged custom among the Muhammadan landholders of a certain village to exclude inferior wives from inheritance would apparently have been recognised both by the Judicial Commissioner of Oudh and by the Privy Council had it been proved by sufficient evidence.

For express legislative provision, exempting certain Muhammadans in Oudh from certain rules of Muhammadan Law, see Oudh Estates Act, 1869, s. 29, and *passim*.

8. For the territories (outside the Presidency Town of Bombay) which are for the time being under the administration of the Governor of Bombay, the law to be observed in the trial of suits is, in the absence of Acts of Parliament and Regulations of Government applicable to the case, "the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity, and good conscience alone."

In the Bombay Mufassal.

Reg. IV of 1827, ss. 3, 26. See *Bai Baiji*, 20 Bom., 53 (1894). The further provision (s. 27) that in case of doubt respecting the Hindu or uhammadan Law the Court shall consult the officers appointed to expound those laws respectively, was repealed in 1864.

In a Privy Council appeal from the Judicial Commissioner of Sind, Lord Buckmaster considered the weight to be attached to evidence regarding a particular custom alleged, by which it is sought to override Muhammadan Law. The party concerned must allege and strictly prove the custom on which he relies, but great weight is due to the evidence by tradition: *Abdul Hussein Khan* v. *Bibi Sona Dero*, L.R., 45 I. A.-[1917], 10, at pp. 12, 13

9. One branch of the Muhammadan Law of Sale, consisting of the rules regulating the right of Pre-emption, is administered as a matter of "justice, equity, and good conscience" to the extent, and in the manner, described in Chapter X of this Digest.

Pre-emption.

See especially ss. 350 to 355 inclusive, and the commentary under s. 371 showing how, in the view of one of the High Courts, the working out of the Law of Pre-emption may incidentally involve recognition of other branches of the Muhammadan Law of Sale. The Madras High Court rejected it as opposed to equity and good conscience; *Ibrahim Saib*, 6 Mad. H. C., 26 (1870); see s. 350, n. 3, below.

10. The Civil Courts of British India are not required or authorised to deal with questions relating to religious usages or institutions unless there is some question "of a civil nature" depending thereon. But a suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies[1]

Suit must be "of a civil nature."

[or tenets [2]]. And a suit by Muhammadans for a declaration of their right to worship in a mosque is a suit of a civil nature.[3]

[1] See s. 9 of the Code of Civil Procedure, 1908, with the Explanation, and the notes on the corresponding section of the Code of 1882 in Stokes' Anglo-Indian Codes, vol. ii, p. 474. All the cases there referred to were between Hindus.

[2] These words are not in the Code, but ought to be, according to *Krishna Sami*, 5 Mad., 318 (1882).

[3] *Fazl Karim*, 18 Cal., 448 (1891).

Although the enactments, of which the effect is given in this and the nine preceding sections, purport merely to govern the decisions of Civil Courts, yet it may happen that a person's criminal liability will be found to depend on his own or some other person's civil rights under the system of personal law hereby recognised. Thus s. 494 of the Indian Penal Code provides for the punishment of any one who, having a husband or wife living, marries in any case in which *such marriage is void by reason of its taking place during the lifetime of such husband or wife.* In order to determine whether a particular marriage is void, and therefore criminal, for this reason, we must, if the accused is, or possibly if he or she has been, a Muhammadan, consult the Muhammadan Law in order to ascertain (1) the validity of the first marriage; (2) whether it has been legally dissolved before the second marriage took place; and (3) whether, if the first marriage was valid and subsisting at the date of the second, it would be a legal impediment thereto. See, for instance, *Ram Kumari*, 18 Cal., 264 (1891), where a woman who, married as a Hindu to a Hindu, became a Muhammadan and married a Muhammadan, was held to have been rightly convicted of bigamy. The Sessions Judge (I think rightly) considered the question to be, whether by Hindu Law the first marriage was dissolved as against the husband by the wife's apostasy, and followed a Bombay decision in holding that it was not. The High Court agreed with him in this, dissenting from an early Calcutta decision to the contrary, but laid more stress on the point that the Muhammadan Law would not allow a Moslem to marry the converted wife of a living infidel, except under conditions which had not been satisfied in this case.

See also s. 74A, below.

Meaning of "where the parties are Muhammadans."

11. When it is said that the Muhammadan Law is to form the rule of decision "where the parties are Muhammadans" it must be understood:

(*a*) That owing to the nature of the reserved topics, connected as they are for the most part with family relations, it cannot easily happen that the litigant should belong to different religions, unless it be the case of a stranger claiming property through one member of a family against another member; and that in such a case the law applicable is that of the family within which the root of title is confessedly to be found.[1]

(*b*) That, in order to justify a Civil Court in treating any person as a Muhammadan, it must be shown that he professes the Muhammadan religion [and is accepted as a member by some recognised Muhammadan community].[2]

(*c*) That a person cannot, merely by professing himself a convert to the Muhammadan religion, release himself from obligations incurred while he was subject to some other personal law.[3]

[1] This may, I think, be inferred *a fortiori* from the decisions on the enactments prescribing the application of "the law of the defendant" referred to above, under s. 3; though in *Bussunteram Marwary*, 11 Cal., 421 (1885), where a Hindu creditor of a deceased Muhammadan sued the heirs of the latter, the Court expressed a doubt, which was surely unfounded, as to Muhammadan Law forming the rule of decision on the question whether one of the heirs could be charged with more than his proportionate share of the debt. Inasmuch as "justice, equity, and good conscience" pointed to the same conclusion as the Muhammadan Law, the doubt was left unsolved.

[2] *Raj Bahadur*, 4 All., 343 (1882). The proposition in the text seems to be all that necessarily follows from the decision. For the facts were, that the person who was the common root of title, and his descendants, the parties to the suit, had been in the habit of performing such a strange medley of Hindu and Muhammadan ceremonies as, in the opinion of the Court, "no follower of either religion could combine in practice without placing himself outside its pale;" and for this reason the Court declined to apply either the Hindu or the Muhammadan Law *as such*, under the first paragraph of s. 24 of Act VI of 1871, the enactment then in force in the N.-W.P., corresponding to the second paragraph of s. 1 of this Digest. But the remarks of Straight, J., embodied in the reporter's headnote, to the effect that to entitle a person to have the Hindu or Muhammadan Law applied to him he must be an *orthodox* believer in the Hindu or Muhammadan religion, must not be taken literally, since the Courts undoubtedly recognise at least two distinct sects of Muhammadans, each of which denies the orthodoxy of the other, and it would be very difficult to say what constitutes orthodoxy in a Hindu.

In the same case it was decided that, under the second paragraph of the enactment above referred to (corresponding with the last paragraph of s. 1 of this Digest) the Hindu rules of inheritance might be applied to parties belonging to a family which had always followed those rules, as a matter of "justice, equity, and good conscience," even though they might not be Hindus in the religious sense.

See also s. 12 below, and notes, especially note 5.

If this decision is correct as regards the Hindu Law, it must also hold good of the Muhammadan Law. But the bearing of the Indian Succession Act, s. 2, read with ss. 331, 332, on the question was not considered by the Court.

For a case in which the Indian Legislature has expressly exempted a particular class of Muhammadans from certain rules of Muhammadan Law, see the Oudh Estates Act, I of 1869, especially s. 29.

[3] See *Ram Kumari*, 18 Cal., 264 (1891), summarised under s. 10, *ante*. In *Skinner* v. *Orde*, 14 Moo. I.A., 309 (1871), the case came incidentally under the notice of the Privy Council of a Christian man, married to a Christian

wife, declaring himself a Muhammadan, and going through a ceremony of marriage as such with another woman. On this the Committee remarked (p. 32[1]), "The High Court expressed doubts of the validity of this marriage, which their Lordships think they were well warranted in entertaining." It is a somewhat different question whether, if both spouses change their religion together, and are re-married according to the form required by their new creed, this amounts to a waiver on the part of each as against the other, of the rights acquired under the original marriage; and it so happens that twenty-eight years later the attention of the same high tribunal was called to this question also by the doings of another branch of the same remarkable family; but here also the view which their Lordships took of the facts rendered it unnecessary for them to decide the point. Stuart Skinner, *alias* Nawab Mirza, was in 1855 married in a Christian church to Charlotte Blake, *alias* Badshah Begum, the illegitimate daughter of a European by a Muhammadan woman. Both parties had previously professed Muhammadanism, and within a year or two both reverted to that creed, and were married again as Muhammadans. A few years later the lady left her husband, asserting that she had been divorced by him, which he denied, and ultimately cohabited with another Muhammadan. Stuart Skinner then commenced cohabitation with another woman, whom he treated as his wife, by whom he had six children, and with whom he continued to live till his death in 1886. Then Charlotte Blake claimed her share of the inheritance as his undivorced wife, either according to Muhammadan, or, in the alternative, according to English Law. This claim Stuart Skinner's second family naturally resisted, insisting that her former story was true, and that the divorce was valid, notwithstanding the original Christian marriage. The District Judge found that the divorce had been pronounced, but that it was inoperative on account of the Christian marriage; the Chief Court of the Panjab and the Privy Council held that the divorce was not proved, and declined to express any opinion as to whether it would be valid if proved. Their Lordships said (p. 546) "Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, is a question of importance, and, it may be, of nicety;" *Skinner* v. *Skinner*, 25 Cal., 537 (1897).

The term "personal law," as used in India, has statutory authority: see s. 112, Government of India Act, 1915 (5 & 6 Geo. 5, c. 61). But the sense in which it is used in Indian law must be distinguished from the sense in which it is used in the Private International Law of Europe. In the Indian sense, the personal law of an individual is the law of his personal status for certain limited purposes, such as marriage, succession, &c., as opposed to the general law of India, which applies to all persons of Indian domicile. In Private International Law, personal law is almost equivalent to the law of domicile, as opposed to the *lex loci*, or the law of the place where the individual happened to be at a given time. See Westlake's Private International Law, 1912, p. 43: *Chetti* v. *Chetti*, Law Reports (England), Probate Division, 1909, p. 78; and the late Sir Frederick Robertson's remarks in his article on the relations between the English Law and the personal law of Indians in England with special reference to the marriage law, in the Journal of Comparative Legislation and International Law, vol. xviii, part 2.

Who is a Muhammadan?

12. For purposes of Anglo-Muhammadan Law, no hard-and-fast test can be applied, to determine whether a given person is a Muhammadan, such as circumcision,[1] or belief,[2] or observance of the ceremonial law.[3] But these matters may be taken into consideration in doubtful cases.

Birth in Islam,[4] with no evidence of renunciation of that faith, or the profession of Islam,[5] would in most cases be sufficient.

[1] In an old case, *Sahebzadee Begum*, 12 W. R., 512 (1869), the test of circumcision was suggested but was not adopted. It was a Shia case, and the principle that " if one of the parents of the infant be a believer, the construction of the law is in favour of the Islam of the infant " (Baillie, II, 265), was followed. The corresponding opinion in Hanafi law will be found in Hed. 64, where the loose wording of the two sentences might seem to imply a different result in the first and in the second sentence. But if read with the literature of the subject generally, it is clear that the infant children of parents, one of whom is a Muslim, are to be treated and educated as Muslims, unless the contrary clearly appears. When they grow up, their conduct decides, but in the absence of any evidence on that point, the Muhammadan presumption would be in favour of Islam.

See also note 3 below.

[2] In *Abdool Razack* v. *Aga Mahomed*, L. R., 21 I. A., 56 (1891), the Privy Council, per Lord Macnaghten, approved the argument that " no Court can test or gauge the sincerity of religious belief."

[3] If the ceremonial law, such as observance of the five daily prayers, or Zakat, or regular fasts in Ramazan, were used as a test, very few Indian Muhammadans would pass the test, and the law might as well not be applied. Even such an external test as circumcision fails. It is a rite nowhere prescribed in the Koran. According to some Traditions the Prophet was *born* circumcised which implies that those who accept that Tradition believe that the operation was not performed on him in the usual way. And certainly there is no account of the rite having been performed, in a life of which we have minute details. Converts to Islam may dispense with the rite if it would cause great suffering—(Hughes, *Dictionary of Islam*, Art. Circumcision). The Mughal Emperors in India were not circumcised, and whole classes of Chinese and Berber muslims are not circumcised (Prof. D.-S. Margoliouth, Art. circumcision Muhammadan in Hasting's Encyclopaedia of Religion and Ethics). The Hedaya (p. 363), speaking of the evidence of Muslims, accepts the evidence of the uncircumcised.

[4] Both according to Shia and Sunni law, apparently if *either* of the parents is a Muslim, the presumption is in favour of the Islam of the child. See the authorities quoted in note (1) above. But general conduct and associations may rebut that presumption, as in *Bhaiya Sher Bahadur*, L. R., 41 I. A., 1 (1913).

[5] In *Abdool Razack*, L.R., 21 I. A., 56 (1891), the argument that " profession, with or without conversion, is necessary and sufficient " to prove Islam for purposes of marriage, was approved by the Privy Council. Possibly, therefore, even acceptance, as a member, by some recognised Muslim community (see above s. 11b), may not be necessary. The Kadianis, or Ahmadis, followers of Mirza Gulam Ahmad of Kadian (Panjab), quite a recent sect, have been held to be Muhammadans, by the Patna High Court : *Hakim Khalil Ahmad* v. *Malik Israfi*, 2 Patna L. J., 108 (1916).

Sects and schools.

13. Muhammadans are divided religiously into sects, and each of the two principal sects into schools, as shown by the diagram on page 91 ; and these religious divisions involve certain divergences with respect to the civil rights with which Anglo-Muhammadan Law is concerned.[1]

It is the duty of a civil judge in British India to apply in each case the law of the sect or school to which the parties profess to belong.[2] In suits between parties claiming to be governed by different varieties of Muhammadan Law, the Courts would probably be guided by the principles laid down in s. 11.[3] But the fact has been judicially recognised that the great majority of Muhammadans are Sunnis, and therefore that the burden of proof lies on him who asserts that the parties to any particular suit are Shias.[4]

[1] For particulars respecting these sects and schools, see Chapters ii and iii of Sir Roland K. Wilson's "Introduction to the Study of Anglo-Muhammadan Law," and pp. 15-24 of this work; and as to the claims put forward by Mr. Justice Ameer Ali on behalf of the modern Motazilas, Chap. XV of this Digest.

Mr. Ameer Ali (Mahomedan Law. vol. ii, p. 12) gives useful information as to the sub-division of the Isna-Ashariya Shias into two schools, the Akhbari and Usuli. The former, according to him, are rigid traditionists, while the latter allow free scope to human reason in the interpretation of the Koran, and estimate the genuineness of traditions mainly by their conformity to the Koranic spirit. He also speaks of the Motazilas, with whose cause he zealously identifies himself, sometimes as an independent sect, and sometimes as an early offshoot of the Shia sect, closely akin to the Usuli school. They must be treated as a dead school, that has played its part in history; for, individuals apart, who wish to revive and develop their doctrines, they have no organised community and no separate body of law. Shahrashani, our classical mediæval authority on Muslim sects, treats the Motazilas as a distinct class from the Shias.

[2] (Rajah) *Deedar Hossein*, 2 Moo. I. A., 441 (1841). "According to the true construction of this Regulation,* in the absence of any judicial decisions or established practice limiting or controlling its meaning, the Mahomedan Law of succession applicable to each sect ought to prevail as to litigants of that sect. It is not said that one uniform law should be adopted in all cases affecting Mahomedans, but that the Mahomedan Law, whatever it is, shall be adopted. If each sect has its own rule according to the Mahomedan Law, that rule should be followed with respect to litigants of that sect. Such is the natural construction of this Regulation, and it accords with the just and equitable principle on which it was founded, and gives effect to the usages of each religion which it was evidently its object to preserve unchanged."

[3] *Hayatunnissa* v. *Muhammad Ali Khan*, 12 All., 290 and L. R., 17 I. A., 73 (1890), was a suit between Shia plaintiffs and a Sunni defendant respecting the right of inheritance to a certain deceased woman. The Court of First Instance decided for the plaintiffs, the High Court and the Privy Council for the defendant; but all three Courts agreed in making their decisions turn upon the question whether the deceased was a Shia or a Sunni at the time of her death. In the High Court the plaintiffs called to their aid the enactment then in force corresponding to s. 37 of the present Bengal, etc., Civil Courts Act, which requires the Court to look to the law of "the parties"; though how they expected the Court to infer from this that if the parties were under

* Reg. IV of 1793, s. 15, differing very slightly from s. 37 of the Bengal, etc., Civil Courts Act, 1887 (s. 1 of this Digest).

different laws that of the plaintiff should prevail, is not stated in the Report and is not easy to imagine. However, Petheram, C. J., took occasion to remark, "To my mind the meaning of the section is clearly that the devolution of the property is to be in accordance with *the law of the person having the property*, without distinction being made between a case of intestacy and one in which a will might be in dispute."

It may be inferred that even if both parties had been Shias, the deceased being a Sunni, the case would still have been governed by Sunni law.

[4] *Bafatun* v. *Bilaiti Khanum*, 30 Cal., 683, 686 (1903).

14. Every adult Muhammadan, whether male or female, can choose for himself or herself the law by which he or she is to be governed, at least as among the four Sunni schools. Freedom of choice.

Whether the choice, once made, can be revoked, is uncertain.

Illustration.

According to Hanafi Law a female who has arrived at the age of puberty without having been given in marriage by her father or father's father can choose a husband for herself. According to Shafeite Law she cannot. A girl, whose parents and family were Shafeite, was allowed, after attaining puberty, to declare her adhesion to the Hanafi school, and so to render valid a marriage subsequently contracted by her without the consent of her father.

Muhammad Ibrahim v. *Gulam Ahmed*, 1 Bom. H. C., 236 (1864). In this case the person in question was a female; the liberty allowed to an adult male is not likely to be less, though it might well be greater. The decision proceeded largely on the opinion of the Kazi of Bombay, himself a Shafeite, that by that law a girl might declare herself a Hanafi. This case was also followed in the Supreme Court of the Straits Settlements in 1878, where the facts were stronger. A Shafei adult woman married a husband of her choice without her guardian's consent. The guardian obtained an injunction to restrain consummation. Her motion to dissolve the injunction was refused, on the ground that she was a Shafei. She *then* became a Hanafi and renewed her application, whereupon the injunction was dissolved with costs. *Salmah* v. *Soolong* (1878), Kyshe's Reports, Straits Settlements, Civil, vol. i, p. 421.

See in Aghnides, Mohammedan Theories, pp. 117—23, and the references there cited, a discussion of Ijtihad, or the exercise of independent thought. The theory of "the closing of the door of Ijtihad" (Aghnides, p. 123) with the last great original thinkers in Muslim theology, who founded the recognised Schools, is a convenient device for preventing further development, but this cannot be accepted by the modern progressive or rationalist schools. The learned may use their judgment in selecting the recognised opinions which they may follow, where these opinions are not unanimous. The better opinion is that they may not only do so in selecting a particular school in its entirety to be affiliated to, but that they may follow any particular opinion of any recognised authority on any particular point of law. This may even apply to an ignorant person (*ammi*) (Aghnides, pp. 130—131), though opinions differ on the subject. In any case, where resort to competent interpreters of the *Shariat* is not possible, any person may, in cases of *bonâ fide* doubt, lawfully act on his own judgment (*tahayyi*), and the act would be valid (Aghnides, p. 132).

This, however, does not seem to have been the view of the framers of the Mussalman *Wakf* Validation Act (VI of 1913), who in s. 2 (2) of the Act define a "Hanafi Mussalman" as "a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law." This definition is not very illuminating, but seems to imply the two untenable propositions: "Once a Hanafi, always a Hanafi," and "a Hanafi on one point is a Hanafi on all points." But the definition is confined to the purposes of that Act only, and need not be extended to a wider scope.

Hanan authorities

15. The rules set forth in Parts II, III, and IV, of this Digest are those of the Hanafi school. The primary authorities for the doctrines of the Hanafi school are the writings,[1] or recorded opinions, of

(1) Abu Hanifa (d. 767 A.D.), from whom the school derives its name.

(2) Abu Yusuf (d. 798 A.D.), Chief Kazi under the Caliph Harun Ar Rashid.

(3) Muhammad (d. 802 A.D.).

The two last are commonly spoken of as "the two disciples."

The relative weight of these authorities in Anglo-Muhammadan Law is unsettled,[2] except that the opinion of Muhammad will in general be outweighed by that of either of the other two,—Abu Hanifa's, because he was the founder of the School, and Abu Yusuf's, because of the very important judicial office which he held.

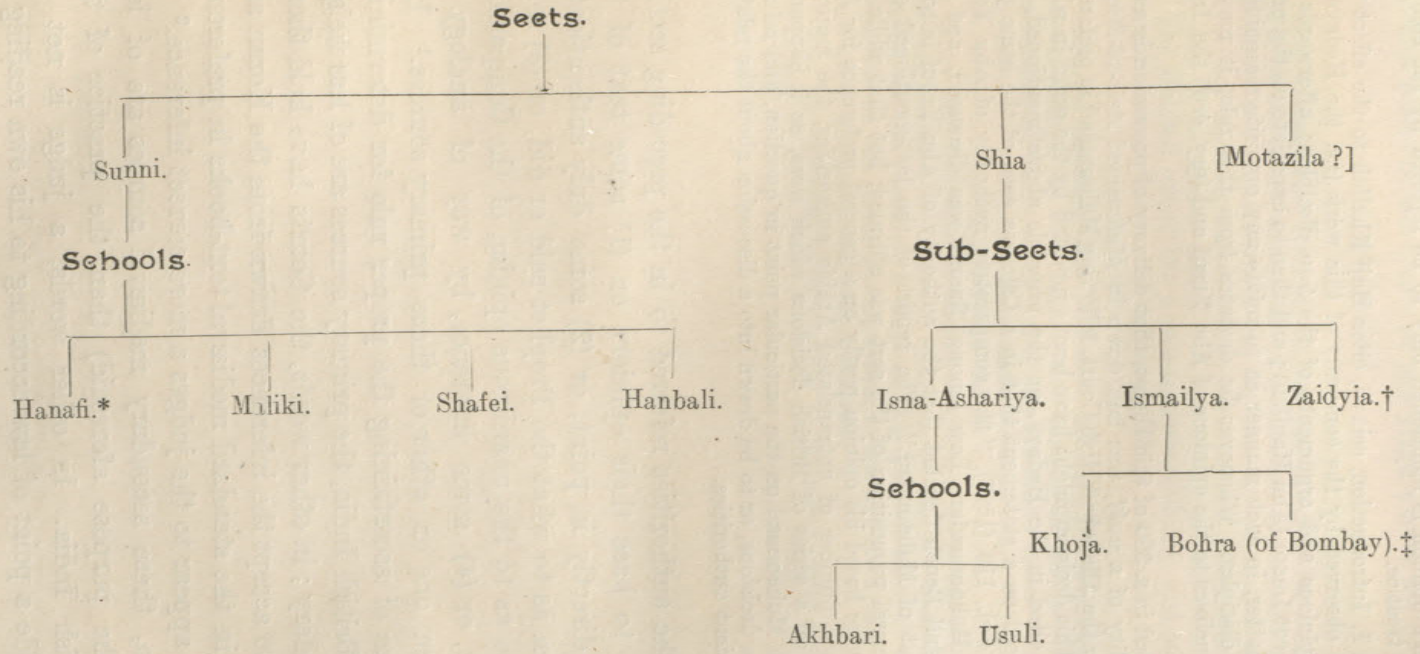
But the scale may be turned in favour of any one of them by proof that his opinion was preferred by the compiler of some standard Digest, such as the Hedaya or the Fatawa Alamgiri.

[1] It is doubtful whether the works bearing Abu Hanifa's name are by him. Probably none of his own works are extant, but his school has preserved and developed his teaching.

[2] In *Sheik Abdul Shukkoar* v. *Raheem-un-nissa*, 6 N. W., 94 (1874), the High Court of the North-West Provinces followed Abu Hanifa alone in preference to the concurrent opinion of the two disciples.* But in *Abdul Kadir* v. *Salima*, 8 All., 162 (1886), the same High Court deliberately declined to follow that decision, and Mahmood, J., himself a Muhammadan, in delivering the unanimous judgment of the Full Bench, laid it down that Abu Yusuf's opinion is to be accepted wherever either Abu Hanifa or Muhammad agrees with him, and he even used language implying that Abu Yusuf alone should carry more weight than Abu Hanifa in temporal matters, by reason of his having actually held

* In point of fact the judgment contradicts itself, first stating that the disciples held the contrary opinion to that of Abu Hanifa, and further on noticing that in one of Macnaghten's Precedents Abu Yusuf is cited as concurring with his master. But the effect of the judgment was represented as above in *Abdul Kadir* v. *Salima*, and disapproved on that assumption.

TABLE SHOWING THE PRINCIPAL MUHAMMADAN SECTS, SUB-SECTS AND SCHOOLS.



* I adopt this adjectival form here and in the text of the Digest, as being that sanctioned by Belot's dictionary and by the usage of all learned Muhammadans, including Ameer Ali, J., in his books, and Mahmood, J., in his judgments (7 All., 461 and 13 All., 419). But the change in the middle vowel, however philologically correct, is apt to puzzle the English reader, and actually led one learned judge (or his reporter) to speak of the founder of the school as "Abu Hanafi"; the mongrel form "Hanifite," however, is an offence to a Moslem ear, and has been discarded.

† Followers of a descendant of Ali who was killed fighting against the Omayyads. See "Spirit of Islam," p. 472.

‡ Not to be confounded with the "Sunni Bohras" of Gujrat, who are governed, like Khojas, by the Hindu Law of Inheritance, while presumably following in other respects the Hanafi form of Muhammadan Law; *Bai Baiji* v. *Bai Santok*, 20 Bom., 53 (1894).

high judicial office, which the other never did. This, however, was a mere personal dictum, neither necessary to the decision of the case nor supported by his authorities. It would be easy to produce passages of the Hedaya in which Abu Yusuf's opinion is mentioned only to be rejected by the compiler of that standard treatise.

Morley, Dig. I, Introduction, cclxvii, cites Haji Khalfah to the effect that "it is a practice observed by the composer of this work (*i.e.* the Hedaya) to state first the opinions and arguments of the two disciples; afterwards the doctrine of the great Imam (Abu Hanifah); and then to expatiate on the proofs adduced by the latter, in such manner as to refute any opposite reasoning on the part of the disciples. Whenever he deviates from this rule, it may be inferred that he inclines to the opinions of Abu Yusuf and (qry. *or ?*) the Imam Muhammad."

The rule stated in s. 320 of this Digest, that delivery of possession is necessary to the validity of a *wakf*, was laid down in *Muhammad Aziz-ud-din*, 15 All.,321 (1893), by the Allahabad High Court, following Muhammad in preference to Abu Yusuf. This decision might have been supported by the order in which the opinions are cited in the Hedaya, on the principle above mentioned, but it was in fact based on a statement that in a Calcutta case of the same year *Bikani Mia*, 20 Cal., 116 (1893), "the comparative authority of Abu Yusuf on questions of Muhammadan Law among Sunnis was discussed, and the majority of the Full Bench decided that the authority of Abu Yusuf is to be postponed to that of Muhammad." The report of the last-mentioned case shows that no general proposition of the sort was affirmed, but that while the one dissentient judge based his opinion partly on a general preference for Abu Yusuf, partly on a number of untranslated Arabic authorities, the majority took their stand on a series of British decisions which were, as it happened, in agreement with Muhammad on the particular point in question, and refused to go behind those decisions, or to be drawn into a discussion about the relative weight of the ancient authorities.

Relative weight of original and secondary authorities.

16. All the authorities referred to in the preceding section profess to base their opinions on (1) some text of the Koran directly in point, or (2) some duly authenticated tradition as to what the Prophet said or did, or (3) some evidence as to the unanimous opinion of the Companions of the Prophet, or (4) some inference, by way of analogy or otherwise, from one or other of these primary sources.[1] But for the purpose of ascertaining the proper rule for determining a civil suit in British India, the primary sources are of less weight than the secondary; in other words, the Courts have held themselves bound to accept the inferences drawn from the Koran and the traditions in the standard mediæval text-books in preference to what might appear to the judges a more correct inference.[2]

But again, these secondary mediæval sources are of less weight (for the purpose aforesaid) than the practice of the Courts of British India. In other words, a judge is not at liberty to decide a point of law according to his own reading of

a mediæval Muhammadan treatise (the Hedaya, for instance) in opposition to a single decision of the Privy Council, or in opposition to a series of decisions of the High Court which he represents or to which he is subordinate.[3]

[1] For examples of (1) and (2), see pp. 10—13. Sources (3) and (4) are accepted by the Shafei school, but in a qualified degree, and they use different terms from the Hanafi school in expounding inferential conclusions. The Maliki school expressly bases itself on the *via media*: they check the speculative deductions of the Hanafi school, but can hardly be said to reject either (3) or (4). The Hanbali school has a re-actionary tendency, and lays most stress on a literalist interpretation of Traditions, but it would not reject (3), and was, at least unconsciously, influenced by (4).

[2] See, for instance, *Aga Mahomed*, 25 Cal., 9 (1897), also P. C., at p. 18. "Their Lordships, on these authorities, must hold that a Mahomedan widow is not entitled to maintenance out of her husband's estate in addition to what she is entitled to by inheritance or under his will. They do not care to speculate on the mode in which the text quoted from the Koran, which is to be found Sura II, vv. 241, 242, is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imamia. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority."

[3] See, for instance, note 5 under s. 85, note 1 under s. 323, and the note under s. 359.

PART II.—FAMILY RELATIONS.

CHAPTER II.

MARRIAGE.

O men, fear your Lord, who hath created you out of one man, and out of him hath created his wife, and from them two hath multiplied many men and women.—*Koran*, chap. iv, 8.

"The Prophet said: Men marry women for their piety, or their property, or their beauty: but ye should marry for piety."—*Trimizi, Jâmi*, I. 331.

Definition.

17. Marriage is a contract for the purpose of legalising sexual intercourse and the procreation of children. It involves the rights and duties hereinafter described—

(1) Between the married persons themselves, and

(2) Between each of them and the children born from the marriage.

This definition is given in Baillie's Digest, referring to the Kanz and to the Kifayah. That given in the Hedaya (Book II, opening paragraph)—"a contract used for the purpose of legalising generation"—seems to mean much the same. The word translated "marriage" is *nikah*, literally "union of the sexes," which seems to be in Arabic the proper term for a regular marriage, but which is applied in Bengal to "a sort of left-handed marriage, considered disreputable, as one contracted with a widow, or only for a given time" ("Wilson's Glossary"; for an instance see *Moneerooddeen*, 18 W. R. Cr. 28).

Parties to the contract. Marriage of minors.

18. The parties to the contract are, always ultimately in contemplation of law, and sometimes in the first instance, the very persons whose sexual intercourse is thereby legalised, and who thereby become husband and wife. But minors of either sex may be so far validly contracted in marriage by their respective guardians[1] that the contract will be irrevocably established,—

(*a*) From the first, and in spite of any attempted repudiation, if the contracting guardian was the father or father's father (how high soever) of the party desiring to repudiate;[2]

(*b*) In other cases subject to an "option of repudiation" to be exercised by the boy or girl on attaining puberty.

In case (*b*) the option must be exercised by a female immediately on the appearance of the physical signs of puberty, or at least on her being made aware of the contract after reaching puberty; otherwise she loses it altogether.[3] But a male retains his option until he has ratified the contract by express declaration or by some act equivalent thereto, as by payment of dower or commencement of cohabitation.[4]

[1] As to who are guardians for this purpose, see Chap. IV.

[2] Hedaya, Book II, chap. ii, p. 37; Baillie, Dig., 50. Ameer Ali however asserts, on the authority of the Fatawa Alamgiri, the Kitab ul Anwar, and the Jamaa-ush-Shittat, that "there seems to be a general consensus among all jurists that where the father has acted wickedly or heedlessly, the marriage is voidable." M. L., Vol. II, 235. The Muhammadan marriage being simply a civil contract, this agrees with the general maxim of English law, that fraud will vitiate any transaction, however legal otherwise.

[3] Hed. 37, 38; Baillie, 51. See also *Muhammad Ibrahim*, 1 Bom. H. C., 236 (1864). There are passages implying that the option of puberty can be exercised even after consummation (*e.g.* Baillie, 53); but these must apparently refer to consummation without the girl's consent. It is elsewhere stated (p. 51) that the option "would be cancelled by her doing anything from which her assent might be clearly implied; *as, for instance, permitting connection with her*, or asking for maintenance, or the like." In British India the legislature has done its best to render consummation of marriage before puberty impossible.

This option is sometimes called the "option of puberty," to distinguish it from the "option of emancipation" (unknown to Anglo-Muhammadan Law) which arises in Muhammadan countries when a person who has been contracted in marriage by his master while in a state of slavery is subsequently emancipated.

It would not be safe to accept as authoritative a strange remark, dropped parenthetically in Hed. 699, while treating of a wholly different subject, to the effect that—"if the infant require her guardian to contract her to any person, being her equal, for whom she has a liking, he must comply." [I think, however, that that is the Hanafi law, the statement being perfectly explicit and treated as one admitting of no argument. A. Y. A.]

[4] Baillie, p. 52; Hed. 38. In both passages the rule is said to be the same for a boy and for a *sayiba*, *i.e.* a woman who had already had connection with a man before her option arose: but practically we are now only concerned with the former.

19. The repudiation by an adult of a marriage contracted for him or her during minority does not *ipso facto* dissolve it, but renders it the duty of a civil judge to decree its dissolution on a proper application being made for that

Effect of repudiation at majority.

purpose.[1] In the mean time the parties remain man and wife in this sense, that

(*a*) If either of them dies the other will inherit to him or her in the capacity of wife or husband, as the case may be ;[2]

(*b*) Sexual intercourse between them is not unlawful ;[3] though the fact of the woman willingly permitting it will have the effect of cancelling a repudiation already declared, and only awaiting judicial confirmation.[4]

[1] Baillie, 50 ; Hed. 37.

[2] Hed. 38 : " If a girl who has been contracted in marriage by her guardians should die before she attain maturity, her husband inherits of her, and in like manner, if a youth so contracted should die before he attains maturity, his wife inherits of him ; *and so also, if either should happen to die after maturity, without a separation having taken place ;* because the marriage contract was regular and valid *ab origine*, and would remain so until dissolved by the dissent of one or both of the parties in the event of their arriving at maturity ; but this being concluded by the demise of one of them the marriage continues good for ever." Reading this with the preceding statement (Hed. 37) that " in dissolving marriage decree is a necessary condition in all cases of option exerted after maturity," the result stated in the text seems to follow. And Baillie (p. 50) is explicit to that effect. " And if a boy or girl should choose to be separated, after arriving at puberty, but the judge has not yet made the separation when one of them dies, they have reciprocal rights of inheritance, and up to the actual separation between them by the judge the husband may lawfully have intercourse with his wife."

[3] Baillie as last quoted ; but this cannot mean that the husband can enforce cohabitation without the consent of the girl who has exercised her option to repudiate the marriage contracted for her by her guardians ; in order to effect his purpose he would have to sue for restitution of conjugal rights, and according to Ameer Ali, J., " it has been held by Muhammadan lawyers that in such a suit the defendant may plead the exercise of the right of option, and if it is established the Kazi may grant the declaration in that proceeding," *Badal Aurat* v. *Q. E.*, 19 Cal., 79 (1891), at p. 83.

[4] That consummation consented to *before the option has been exercised* has the effect of extinguishing the option and establishing the marriage, is distinctly stated at p. 51, and it seems reasonable to suppose that it would also have the effect of cancelling proceedings already commenced for annulment of the marriage ; but if so it was hardly worthwhile to state that " up to the actual separation by the judge the husband may lawfully have intercourse with his wife." It would have been simpler to say that till then the repudiation is revocable. The meaning, however, seems to be that such intercourse is not *zina* and cannot be punished as *zina*.

Doubt as to criminal liability for premature remarriage.

20. If a girl, who has been contracted in marriage but has an option of repudiation, contracts another marriage before her exercise of the option has been judicially confirmed, she and the man to whom she is married cannot be con-

victed of bigamy;[1] nor can the wife of a Muhammadan husband who, subsequently to the marriage, embraces Christianity, such wife marrying another husband in good faith during the period of her *iddat*, even though the first husband is re-converted to Islam during such period.[2]

[1] In Ameer Ali's Mahommedan Law, vol. ii, p. 336, it is said that "the Indian Law Courts have often gone wrong in convicting girls of bigamy who in their infancy had been contracted in marriage by their guardians, but who on attaining their majority had married other men. In any case, these convictions would be wrong; for, supposing even consummation had taken place after the first marriage, the subsequent marriage being *shubhat ul akd* (contract under erroneous supposition), neither the women nor the men marrying them would, under the Mahommedan Law, be liable to any punishment; though the Kazi might give back the woman to the first husband. But when there has been no consummation, and the girl, on attaining puberty, and during the absence or imprisonment of the man to whom she was contracted in infancy, marries another person, the second marriage, it seems to me, would be valid. In *Badal Aurat* v. *Q.-E.*, 19 Cal., 79 (1891), such a conviction was quashed by Ameer Ali, J., himself, Beverley, J., concurring; but it was a case in which the first marriage had not been consummated, and, moreover, that marriage was one which the girl was entitled to repudiate on attaining puberty, though she had omitted to do so formally, the first husband being in jail at the time. It has been determined in a Hindu case, *R.* v. *Sambhu*, 1 Bom., 347 (1877), that *bonâ fide* belief in the legality of the second marriage is no defence to a charge under s. 494 of the Penal Code, but in this case the former marriage still subsisted and its dissolution did not depend on the option of the woman.

[2] *Abdul Ghani*, 39 Cal., 409 (1911). As Holmwood, J., remarked: "The parties in this case appear to have acted in good faith on what they believed to be a sound interpretation of a very difficult point of Mahomedan Law. Even though they were mistaken, the consequences could not be visited upon them in a Criminal Court administering the penal laws against bigamy." The Bombay (Hindu) case of *Shambhu*, cited above, was not referred to, but it can be clearly distinguished, as the Muhammadan marriage in *Abdul Ghani* became void on the husband's apostasy, though certain consequences of it still subsisted.

21. A lunatic cannot personally contract a valid marriage;[1] but a marriage may be validly contracted on behalf of a lunatic of either sex by his or her legal guardians.[2] Lunatics.

[1] Baillie, 4.

[2] Baillie, 50. "Lunatics, whether male or female, and whether the madness be continued or with lucid intervals, are like the boy and girl, and their guardian may accordingly contract them in marriage when the madness is continued."

As to who are guardians for this purpose, see s. 93.

Probably reasons of public policy would now prevail against the validity of the marriage of a lunatic contracted by his or her guardian.

Option of repudiation of female ex-lunatic

22. A female lunatic contracted in marriage by her father or paternal grandfather, how high soever, or by her son or son's son, how low soever, is bound irrevocably by the contract. But if the contract was made by any other relative, she has an option on recovering her reason.

Baillie, 53, giving to the word "grandfather" the sense that it usually bears in this connection, and comparing p. 45 as to the son's son. Nothing is said about the option of a male ex-lunatic, probably because a husband's unlimited power of divorce would deprive the question, for him, of most of its importance.

Doubt as to power of cancellation for inequality.

23. A sane adult of either sex is legally free to contract a marriage without the intervention of any guardian, and to repudiate any marriage contracted for him or her without his or her consent;[1] but *perhaps* a marriage otherwise lawfully contracted by an adult woman can be or must be, set aside by a Civil Court at the instance of the so-called guardians (that is of the relatives who would be guardians if the woman had been a minor) if they can prove such social inferiority on the part of the bridegroom as would injuriously affect the family credit or interest.[2] It seems certain that the "guardians" cannot cancel a marriage on any such ground of their own motion without a judicial decree.[3] The fact of the woman being socially inferior to the man is no bar whatever to marriage.[4]

[1] Baillie, 54.

In *Asgur Ali* v. *Muhabbut Ali*, 22 W. R., 403 (1874), the father of a Muhammadan girl, alleging her to be under age, gave her in marriage to the plaintiff who, suing for conjugal rights, failed on the ground that she was of age and had not consented. He then sued the father, apparently for breach of contract, and it was held that he might recover, in such a suit, damages for the loss of the girl as his wife; that he could not recover, as damages for the breach of contract, the value of the presents made to the bride and her family; but that, if fraud were established, and if it were shown that the presents were a natural consequence of the negotiation, and in conformity with custom, he might recover damages to be determined by the circumstances.

[2] In *Mohumdee* v. *Bairam*, 1 Agra, 130 (1866), it was held that the bride's father could set aside the marriage on the ground of inequality, if it had taken place without his consent, the consent of the bride's mother and brother notwithstanding.

If the guardian took her dowry or provided her *jahez* (trousseau), such an act is construed as consent or acquiescence on his part, and he cannot afterwards object: Baillie, I, 68. Nor, according to the better opinion, can such

an objection be raised after she has borne a child to the husband of inferior status, as the child's interests must be protected; *ibid.* 69.

[3] As to the pure Muhammadan Law on this point, the Hedaya, p. 40, states that "if a woman should match herself to a man who is her inferior, the guardians have a right to separate them, so as to remove the dishonour they might otherwise sustain by it"; but Baillie, Dig. 67, representing the Fatawa Alamgiri, says that "to make a separation for this cause—that is, for inequality—it must be done before the judge; and without cancellation by a judge the marriage between the parties is not cancelled."

Another passage of the Fatawa Alamgiri, as quoted in Ameer Ali's Mahomedan Law, vol. ii, p. 332, declares that except "Islam and freedom, equality in any other respect is not invariably observed in any country other than Arabia."

[4] Hed. 40. "It is not necessary that the wife be the equal of the husband, since men are not degraded by cohabitation with women who are their inferiors."

Although the law is as above stated, yet in practice, owing to the seclusion in which Muhammadan women of good family are usually kept in British India, it is extremely rare for a virgin, even though adult, to receive addresses personally from a suitor, or to have more than a negative voice, if even that, in the disposal of her person. Usually the father or other (so-called) guardian makes a provisional contract on her behalf before she knows anything about it, and then comes to ask her consent. It is said in the Hedaya (p. 35), on the authority of a saying of the prophet, that silence is to be taken as signifying consent, unless the contracting guardian is a more distant relative than an uncle, and it is further laid down that her acquiescence is not the less binding if given in ignorance of the law which confers on her the right to refuse. Explicit consent is always necessary in order to bind an adult woman who is not a virgin.

That a marriage brought about by fraudulent misrepresentation is invalid unless ratified (after the true state of the case has come to the knowledge of the party deceived) was held in *Abdul Latif Khan*, 31 All., 343 (1909), on the authority of the *Radd ul Muhtar*, as cited by Ameer Ali, M. L. vol. ii, 326. There the father of the bride had suppressed the fact that she was suffering from an illness which prevented consummation, and of which she died.

THE FORMAL REQUIREMENTS OF A MUHAMMADAN MARRIAGE.

24. Neither writing nor any religious ceremony is necessary to the validity of a marriage contract,[1] though either may be important as evidence that the transaction was really intended to be a marriage.[2] But words of proposal and acceptance must be uttered by the contracting parties or their agents (*vakils*) in each other's presence and hearing and in the presence and hearing of two male, or one male and two female, witnesses, who must be sane and adult Moslems;[3] and the whole transaction must be completed at one meeting, so that if (for example) after the proposal has been made by one

Formalities. Proposal and acceptance before witnesses.

party, the other party leaves the room or engages in other business before communicating his or her acceptance, a subsequent bare acceptance, without the whole ceremony being gone through before witnesses, will not have the effect of completing the contract.[4]

[1] This negative proposition is sufficiently proved by the silence of all the authorities.

[2] In *Badal Aurat* v. *Q.-E.*, 19 Cal., 79 (1891), at p. 81, Ameer Ali, J., went so far as to say, "Had there been a legal marriage, a mollah would have been present, with the necessary witnesses and *vakils* to read the *sigha* (formula of marriage);" he is evidently referring to the ordinary practice in that part of the country, not to any legal requirements, which are satisfied if sufficient words of proposal and acceptance have been gone through before witnesses; for he says expressly in his book (vol. ii, p. 282), that "a marriage is legal and binding if celebrated *per verba de præsenti*."

[3] Hed. 26; Baillie, 6. *Aklemannessa Bibi*, 31 Cal., 849 (1904), where the above statement of the law was quoted with approval by the Court. That these requirements are part of the substantive law of marriage, and are not mere rules of evidence so as to be superseded by the Indian Evidence Act s. 134, may be inferred from the statement cited by Baillie (p. 5) from the Inayah, that "this condition is peculiar to marriage, which is not contracted without the presence of witnesses, *contrary to the case of other contracts, where their presence is required, not for contracting, but only with a view to manifestation before the judge.*"

The effect of dispensing with these not very stringent requirements without substituting any other formality, such as compulsory registration, would be to encourage carelessness and haste in relation to the most important of all contracts, and to aggravate the present uncertainties of litigation. The Egyptian Code (Art. 4) states expressly that acceptance of presents, or even of the dower-money itself, does not constitute a valid acceptance of an offer of marriage.

[4] Baillie, 10.

The words used must not relate to the future.

25. In order to distinguish an actual contract of marriage from a mere promise to marry, it is necessary that the words of proposal and acceptance should be such as to show an intention to establish the conjugal relation from the moment of acceptance, and not at some future time.

This seems to be the principle involved in the curious rule laid down by the Arabian lawyers with reference to the peculiarities of Arabic grammar, that the declaration and consent *must be both expressed in the preterite*, "because, though the use of the preterite be to relate that which is past, yet it has been adopted in the law, in a creative sense, to answer the necessity of the case" (Hed. 25).

The English translator explains that "the present and future being expressed in the Arabic language under one form, a contract expressed in the present would be equivocal." And see Wright's Arabic Grammar, vol i, p. 77.

26. It is also necessary that the verb, or verbal noun, employed to express the nature of the contract should either denote marriage literally and unequivocally or should, if figurative, be such as to suggest a permanent and immediate rather than a temporary deferred relation.

Nor suggest mere temporary possession.

Illustrations.

Words implying *gift*, *transfer of ownership*, or *purchase*, will suffice to establish a contract of marriage.

Words expressive of *hire*, *loan*, or *license*, will not suffice.

Baillie, 10—12 ; Hed. 26.

27. A contract of marriage may be made through agents acting *ad hoc* on behalf of the bride and bridegroom themselves, or of their guardians, as the case may be ; and the powers of such agents to bind their principals will be found to be practically much the same, whether they are considered to depend upon the general law of British India respecting contractual agency, or upon the corresponding branch of Muhammadan Law.[1] The following rules, however, being laid down in Muhammadan law-books under the head of marriage, are probably binding in India as rules of Muhammadan Law, irrespective of their agreement or disagreement with the general territorial law.

Agency for purposes of matrimony.

(1) The same person may be agent for both parties and contract them to each other by a single form of words.[2]

(2) The agency need not be specifically to propose to, or accept a proposal from, a particular man or woman, but may be an authority to contract a marriage, with *any* man or *any* woman, as the case may be, or (an intermediate case) with any man or woman answering a given description.[3] But it must be a special agency for purposes of marriage.

(3) An agent authorised without reference to a particular individual cannot make the contract with himself or with any one under his guardianship ;[4] and

(4) An authority to contract a marriage generally does not authorise the agent to contract an unequal marriage on behalf of a woman,[5] nor to render a male principal

liable for more than (approximately) the proper dower.[6]

[1] See, for the Muhammadan law of agency, Book XXIII of the Hedaya; and for the general territorial law on the same subject, chap. x of the Indian Contract Act, 1872; for matrimonial agency in particular, the concluding section of chap. ii in Book II of the Hedaya, and Book I, chap. vi in Baillie's Digest. The Muhammadan Law, like the Roman and unlike the English, is inclined in ordinary contracts, such as sale and hiring, to regard the intermediary as primarily contracting in his own name, and to treat the understanding between him and his principal as a matter with which the other contracting party has no concern; but it is expressly stated that "marriage, which is frequently effected through an agent on both sides, *and almost invariably so on the part of the woman*," belongs to the class of contracts in which the agent is no more than a negotiator, and the principal is alone entitled to the rights and liable to the obligations of the contract. Matrimonial agency is therefore true agency within the meaning of the Indian Contract Act.

[2] Hed. 42; Baillie, 84. Compare the position of an English (or Indian) auctioneer, as agent for both vendor and purchaser, Anson on Contracts, p. 329 3rd edition.

[3] Hed 43; Baillie, 78. "A man directs an agent to marry him to a white woman, and he marries him to one that is black, or *vice versâ*, the contract is not valid; but it would be valid if the direction were for a blind woman, and the agent should marry him to one having sight"—[in other words, a commission to procure a blind wife would be construed as being a commission to procure a wife of some sort, *even though she should be blind*].

[4] Baillie, 76, 77. The only difference between the Muhammadan Law on this point and the modern Anglo-Indian Law as laid down in s. 215 of the Contract Act, is that the latter throws upon the principal the burden of expressly repudiating the bargain, and of showing that it is in fact disadvantageous, or that there has been dishonest concealment.

If a woman give authority to a man to contract her in marriage specifically with himself, and he accordingly execute the contract in the presence of two witnesses, the Hanafis hold the ceremony valid, but not the Shafeites unless the man is the woman's guardian (Hed. 42).

[5] Hed. 388; Baillie, 77. This was the opinion of the "two disciples," which prevailed in practice over the contrary opinion of Abu Hanifa.

[6] Baillie, 80.

Unauthorised agency. Subsequent ratification.

28. In marriage, as in other contracts, want of authority on the part of the person styling himself an agent (*fuzuli*) may be cured by subsequent ratification on the part of the person whom he named as his principal; but if the marriage contracted by an unauthorised intermediary was void by reason of some other circumstance *then* existing, irrespective of the want of authority, no subsequent ratification can render it valid, even though the original cause of nullity may have been removed in the interim.

Illustration.

A *fuzuli* contracts a marriage for a man who has already four wives living and undivorced. That man cannot ratify the transaction, even after the death or divorce of one of his existing wives, though he can of course enter into a fresh contract with the same woman.

Baillie, 85—88. As to the number of wives allowed to a Moslem, see. s. 32, *post*.

Optional registration in Bengal.

29. In such districts of the administrative provinces of Bengal and Assam, as the Governor or Chief Commissioner may from time to time direct, provision is made by a local Act for the optional registration of Muhammadan marriages by a Muhammadan registrar ; but it is expressly provided (among other things) that nothing in that Act shall authorise the registrar to be present at a marriage ceremony unless invited.

Bengal Act, I of 1876, " An Act to provide for the voluntary registration of Muhammadan marriages and divorces," read with Act VII of 1905. Mr. Ameer Ali is probably right in thinking that this provision ought to be made compulsory and general. So far as I have been able to ascertain, there is no State provision in any other part of British India for the registration of Muhammadan marriages. Kazis are apparently appointed by some internal arrangement among the Muhammadans of each locality, and one of their functions is to be present at marriages and to keep a record of the transaction ; and where the Kazi's Act, 1880, has been put in force the Local Government may, if desired by any considerable number of Muhammadans, in any local area, itself appoint a Kazi ; but nothing in the Act is to render the presence of a Kazi necessary at the celebration of any marriage, or to prevent any one acting as Kazi, and the Act is altogether silent as to the duties of the Kazis so appointed.

Proper celebration of marriage, when presumed.

30. The due fulfilment of the above-mentioned formal requirements may be presumed, in default of evidence to the contrary, from

(*a*) Continual cohabitation as husband and wife ; or,

(*b*) The fact of the man acknowledging as his son a child born to the woman.

[For further particulars as to the latter, see the chapter on Parentage.]

Hidayat Oollah v. *Rai Jan Khanum*, 3 Moo. I. A., 295 (1844) ; s.c., *Shumsoonnissa Khanum* v. *Rai Jan Khanum*, 6 W. R., P. C., 52 ; and see *Mahomed Bauker*, 8 Moo. I. A., 136 (1860). *Nawabunnissa* v. *Fuzooloonissa*, Marshall, 428 (1863) ; s.c., *Fuzloonnissa* v. *Nawabunnissa*, 2 Hay, 479. [Cohabitation proved, but not as husband and wife.] *Monowar Khan* v. *Abdoollah Khan*, 3 N. W., 177 (1871). *Imambandi*, 45 I. A., 73 (1918). *Khajooroonissa*, 2 Cal., 184 (at p. 199), (1876).

For instances in which the facts alleged were *not* sufficient to raise a presumption of marriage, see *Jariut-ool-Butool*, 11 Moo. Ind. App. 194 (1867), followed in *Ghazanfar Ali Khan*, 32 All., 345 (1910); s.c. L. R., 37 Ind., App. 105; *Kareemoonissa* v. *Ataoollah*, 2 Agra, 211 (1867); *Ashrufood Dowlah*, 11 Moo. Ind. App., 94 (1866), at p. 115; quoted and followed in *Masit-un-nissa*, 26 All., 295 (1904). In the two first-mentioned cases the presumption of marriage which might have arisen from prolonged cohabitation was held not to apply because the woman in question was admitted to have been originally a professional prostitute. In the last-mentioned case prolonged cohabitation with a woman of inferior social position in a dwelling separate from, and inferior to, that in which the undisputed wife lived was held to be equally consistent with wifehood or with concubinage, and therefore to raise no presumption of marriage.

Before the passing of the Indian Evidence Act (1872) there was considerable doubt as to how far the English or any other rules of evidence were binding on Courts in the Mufassal; consequently those Courts had more justification than they would have now for applying the special evidence-law of the parties on the ground of "justice, equity, and good conscience." Since the passing of the Evidence Act, the aforesaid presumption can only be recognised as a rule of Anglo-Muhammadan Law if it can be regarded as something more than a mere rule of evidence, and as an integral part of the Muhammadan Marriage-Law or Inheritance-Law, as the case may be. It will be seen that all but two of the cases above cited were decided before 1872, but there was no suggestion in either of the two later cases that the passing of the Evidence Act had made any difference. So far as clause (*a*) is concerned, substantially the same result is arrived at under s. 50 of the Evidence Act;* while as regards clause (*b*) the question can be more conveniently discussed in the next chapter, as bearing upon the legitimacy of the child.

THE LIMITS WITHIN WHICH POLYGAMY IS PERMITTED.

Polyandry forbidden. The *iddat* or period of waiting

31. It is not lawful for a woman to have two or more husbands at the same time. And a woman is further bound to observe a minimum interval, called the *iddat*,† between the termination, by death or divorce, of one matrimonial connection and the commencement of another.[1]

The ordinary duration of the *iddat* is three courses in the case of a woman subject to menstruation, three lunar months in other cases, where the marriage has been terminated by divorce; four months and ten days where it was terminated by death; but, if the woman be pregnant, it continues in any case until

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* "When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such a relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact."

† Lit., number, period.

delivery, and terminates in the case of a divorced woman, upon delivery.[2]

[1] Baillie, Dig. 27. "It is not lawful to marry the wife, or the *mootuddah* of (*i.e.* woman undergoing *iddat* in respect of) another." Koran, iv, 24. "Ye are also forbidden to take to wife free women who are married, except those whom your right hands shall possess as slaves." Kor. ii, 228, and ii, 234 fixes the period of *iddat*.

[2] Hed. Book IV, chap. xii, p. 128, as to the "edit" of divorce in case of pregnancy, p. 129 as to "edit" of widowhood. Baillie, 350—355. There is this distinction between the two kinds, that there is no *iddat* in case of divorce before consummation, but the *iddat* of widowhood is imposed on a child-widow, simply as a mark of respect for the deceased husband, though there is no more possibility of confusion of offspring in the one case than in the other.

The *iddat* of a pregnant widow continues for the full period of four months and ten days even if a child is born within that period; (*Ilahia* v. *Imam Din*, Panj. Rec., Civ. case, 29, 1909, p. 77).

The period counts from death or divorce as the case may be, irrespective of when the information reaches the woman (Baillie, 1875, p. 357). In the case of a divorced woman whose husband dies before her period of *iddat* expires if the divorce was revocable (s. 61 below), a fresh period of *iddat* of death will begin from death (Baillie, *id.*).

32. It is lawful for a man to have as many as four wives at the same time, but not more. Number of permitted wives.

Baillie, 30; Hed. 31 (Book II, chap. i). The rule rests ultimately on the Koran, iv, 3. "If ye fear that ye cannot do justice between orphans, then marry what seems good to you of women, by *twos, or threes or fours;* and if ye fear that ye cannot be equitable, then only one, or what your right hands possess." The accepted interpretation of this somewhat ambiguous text was fortified by traditions, which, if trustworthy, would prove that the prophet not only drew the line at the number four in practice, but applied the rule retrospectively to new converts, even as against wives who were also converts. Thus, "Ghailan-bin-Salmah became a Musleman, and he had married ten women in the days of his ignorance, and they all became of the faithful along with him. Then his highness said, 'Keep four of them and send the remainder away'" (*Mishcat ul Masabih*, vol. ii, p. 93). And again, "Nawfal-bin-Muawiah said, 'I became a Musleman when I had five wives; and I asked the prophet about this matter. He said, "Send one away and keep four." Then I wished to send the woman away who was sixty years of age and had not bred; and I turned her off'" (*Ib.* p. 94).

In the autobiography of Abdur Rahman, Amir of Afghanistan, that remarkable potentate, who is proclaimed on his coins to be "the light of the nation and of religion," records, without seeming to think that any explanation is required, that he himself had seven wives, and that his eldest son (Habibullah), by his advice and as a matter of policy, in order to unite him with the chief families of the kingdom and so strengthen his claim to the succession, had at the time of writing six wives all living, and was betrothed to a seventh. After Amir Abdur Rahman's death, however, the Amir Habibullah divorced three of his seven wives, with leave to re-marry, and with due provision so long as they should remain unmarried, and commanded his subjects to conform to the law in like manner. See *Times* for March 9, 1903.

As to the discussion at Akbar's Court on this point, see Sir R. K. Wilson's "Introduction to the study of Anglo-Muhammadan Law," p. 79.

Two instances have come before the Courts of stipulation made at the time of the first marriage that the husband should not contract a second marriage during the continuance of the first, viz. *Sheikh Mohabuth Ally*, Marshall, 361 (1862), and *Badarunnissa Bibee*, 7 B. L. R., 442 (1871). In the first case the Court merely decided that the breach of such a condition did not, *per se*, entitle the wife to a divorce, and therefore cannot be said to have been directly overruled by the second, which shows that a wife can (as stated in s. 67, *post*) stipulate directly for the power to divorce herself in specified contingencies, and that one of the contingencies which may be so provided against is that of the husband availing himself of his legal right to take another wife. See also *Poono Bibi*, 15 B. L. R., App., 5 (1871), where a contract containing a similar clause came before the Court, but the dispute was on another point.

Punishment of unsanctioned polygamy.

33. A Muhammadan man or woman contracting marriage in violation of sections 31 or 32 is punishable (in British India) with imprisonment which may extend to seven years, and also with fine.

Indian Penal Code, s. 494. "Whoever, having a husband or wife living marries *in any case, in which such marriage is void by reason of its taking place during the life of such husband or wife*, shall be punished," &c. The other party to such a marriage is liable to the same punishment as an abettor (I. P. C.,s.,109). These provisions entirely supersede the Muhammadan Law on the subject. According to that law, as was observed in *Himmat* v. *Shahebzadee Begum*, 14 W. R. 125 (1870), "any connection between the sexes which is not founded either upon contract or upon slavery is denounced as '*zina*,' or fornication." It is punishable, according to the Hedaya (Grady, p. 178), with death if the offender (of either sex) is a married person, with scourging if not. There is therefore no occasion in that system for any separate penal law against contracting an unlawful marriage; but it is otherwise in modern India. See s. 52 *post*. also p. 52 and foot-note, *ante*.

RULES RESTRICTIVE OF INTERMARRIAGE.

The kinds of relationship.

34. Persons are prohibited from intermarrying when they are closely related to each other by Consanguinity, Affinity, or Fosterage.

Consanguinity.

Consanguinity.

35. A man is prohibited on the ground of consanguinity from intermarrying with

any ascendant;

any descendant;

any daughter of his father or of his mother; in other words, any sister, whether full, consanguine, or uterine; any daughter of any

other ascendant; in other words, any aunt or great-aunt, how high soever, and whether paternal or maternal; and lastly, any daughter or grand-daughter, how low soever, of a brother or sister, full, consanguine, or uterine; in other words, a niece or great-niece, how low soever.

Baillie, 23; Hed. 27.

The primary authority is the following passage of the Koran, iv, 25, extended by juristic interpretation in the manner indicated by the words in brackets. "And do not marry women your fathers married—except bygones—for it is abominable and hateful, and an evil way; unlawful for you are your mothers [extended to all female ancestors h.h.s.], and your daughters [extended to all descendants h.l.s.], and your sisters [interpreted to include half-sisters on either side], and your paternal aunts and maternal aunts [extended to great-aunts, h.h.s.] and your brother's daughters, and your sister's daughters [extended to great-nieces, h.l.s.].

On the other hand, we are expressly told that a man may (as in England) marry his consanguine half-brother's uterine half-sister, or *vice versâ*, there being in such cases no actual consanguinity. See Baillie, 195.

In questions of consanguinity and affinity it would appear that the fact of illegitimate or legitimate birth would make no difference. This is accepted doctrine in English law (*Re James Phillips, Charter* v. *Ferguson*, chancery Div. 1918, Times Law Rep. XXXV, 98); and the whole tenour of Muhammadan Law, leaves no doubt that the same principle would hold good under it.

Affinity.

36. A man is prohibited on the ground of affinity from intermarrying with Affinity.

(1) The wife of his father, father's father, etc., h.h.s. (though she be not his own mother, grand-mother, etc.).

(2) His own wife's mother or grandmother, h.h.s.

(3) His own wife's daughter or granddaughter h.l.s., or lastly, with

(4) The wife of his son, or son's or daughter's son, h.l.s.

But as regards (3) the second marriage is only prohibited if the first had been actually consummated.

N.B.—"Wife" in this rule includes widow, and also a deceased or divorced wife; and further, any woman between whom and the man whose affinity is in question any illicit sexual connection has at any time taken place, or even any undue familiarity. On the other hand, it does not include a woman whose first marriage was invalid and was not followed by cohabitation.[1]

For this and most other purposes what is called "valid retirement" (*Khalwat Sahih*), *i.e.* the man and woman being alone together under circumstances presenting no physical, legal, or conventional obstacle to intercourse, is equivalent to actual intercourse.[2]

[1] Baillie, 24—30; Hed. 28, resting ultimately on the Koran, iv, 23, "and your wives' mothers, and your stepdaughters who are your wards, born of wives to whom ye have gone in; but if ye have not gone in unto them it is no crime in you; and the lawful spouses of your sons from your own loins."

The father's wife is not expressly mentioned in this text; but the Mishcat-ul-Masabih, p. 93, reports an interesting tradition on the point, from one Baráa bin Aazib. "My maternal uncle passed by me, having a standard, which his highness had sent with him, as a sign that he was sent on business; and I said, 'Where are you going?' He said, 'His highness has sent me to a man who has married one of his own father's wives, to bring his head' (or, according to another version, to strike off his head and take his property)."

[2] Baillie, 98; Hed. 45.

Fosterage.[1]

Fosterage.

37. A man is prohibited from marrying (except as hereinafter stated) any woman so connected with him through some act of suckling that, if it had been instead an act of procreation, she would have been within the prohibited degrees of consanguinity or affinity.[2]

But a marriage which is only improper on the ground of fosterage remains in force until dissolved by the Court.[3]

The recognised exceptions to the general rule of prohibition are the following:—

1. Sister's foster-mother.
2. Foster-sister's mother.
3. Foster-sister's foster-mother.

} All included under the term "sister's mother by fosterage"[4]

4. Foster-son's sister.
5. Foster-brother's mother [and presumably also, brother's foster-mother, and foster-brother's foster-mother].
6. The mother of a pat. or mat. uncle or aunt by fosterage [presumably with the like extension].
7. Nephew's mother by fosterage, etc.
8. Foster-child's grandmother.
9. Foster-child's aunt.
10. Mother of son's sister by fosterage.
11. Daughter of child's brother by fosterage.

And the following relations where the person whose matrimonial possibilities are in question is a woman ; *viz* :—

12. Sister's father
13. Son's brother
14. Niece's father
15. Child's grandfather
16. Child's maternal uncle

} by fosterage.

Explanation.—In order to establish a relationship by fosterage and consequent prohibition of intermarriage between two persons, the suckling of both, or the suckling of one and the birth of the other, as the case may be, must have taken place within the same period of " milk " or fosterage, which is taken to cover not more than two years [or two years and a half[5]] ; or, as between the foster-mother and the foster-child, the latter must have been suckled within the age of fosterage, *viz.*, two years or two years and a half.

[1] See, on the whole subject, Baillie, Book II, pp. 193—203 ; Hed. 67—72. And note especially the general statement at p. 194 of Baillie's Digest that " to the suckling, both his foster-parents and their ascendants and descendants, either by natural descent or fosterage, are all prohibited." There appears to be no British case-law on this subject. The matter seems to have little importance in modern India, because the wet-nurse is usually a hired servant between whose family and the family of her nursling the question of intermarriage will seldom arise, on account of their social inequality. There may even possibly be a difference in religion. Moreover, mothers who cannot nurse their own offspring resort more and more to bottle feeding and the use of infants' foods. The conditions in Arabia in the Prophet's time were wholly different. See remarks at pp. 57 *et seq.*, *ante*.

The ultimate authorities are :—

(1) The passage of the Koran last referred to (iv, 25), which enumerates, among other prohibited relatives, " your foster-mothers and your foster-sisters."

(2) A saying of the Prophet reported in the Hedaya : " Whatever is prohibited in consanguinity is prohibited in fosterage." This evidently gives a very wide analogical extension to the Koranic text, and taken in connection with the definition of fosterage, gives the result stated in the first paragraph of this section. It is well illustrated by the following tradition among others, preserved in the Mishcat-ul-Masabih, p. 91. Ayesha, the wife of Muhammad, is represented as saying : " The brother of the woman's husband who had nursed me came and asked permission to come to me ; but I refused him, till asking the Prophet ; then the Prophet came, and I asked him, and he said, ' Verily he is your uncle, then allow him to come in.' I said, ' O messenger of God ! the woman nursed me, not the man.' The Prophet said, ' Verily he is your uncle, then tell him to come in ; because the man whose wife hath suckled you, is your foster-father, and his brother your uncle.' And this his coming happened after the orders for shutting up women " [therefore he would

not have been admitted had he not been counted as a relative within the prohibited degrees].

[2] Baillie, 194. "The illegality of affinity is also established by fosterage, so that the man's wife would be unlawful to the suckling, and the wife of the latter be unlawful to the man, and by the same analogy in all other cases except two." The two exceptions which follow are those numbered(4) and (2) respectively in the list set out in the text.

[3] Baillie, 200. "No separation can be made on account of fosterage, except by order of the judge. But when attestation is made to a woman after her marriage, by two men or by one man and two women, being just persons, she ought not to remain with her husband, as their attestation would be sufficient to establish the fosterage before the judge."

[4] The expression, "sister's mother by fosterage," with its threefold application, is found in Hed. 69, as is also the permission to marry a foster-son's sister; the complete list of exceptions, in which these are included, is taken from Baillie, 194. In the 1st and 2nd editions I tried to state a common principle which would cover all these exceptions, but I do not think the attempt was successful. No actual applications of the supposed general rule, that the prohibition on the ground of affinity by fosterage is co-extensive with the prohibition on the ground of real affinity, are given in either of the books, except the simplest of all; namely, that a man may not marry the widow or divorced wife of his foster-son or of his foster-father.

[5] Baillie, 193; Hed. 68. There is a difference among the Hanafi authorities as to the exact period, Abu Hanifa himself fixing it at thirty months, the two disciples at two years. The order in which the arguments are stated in the Hedaya seems rather to imply a preference for the former, but, as was shown in Chap. I, note to s. 10, the recent tendency of the Courts has been to adopt Abu Yusuf's opinion whenever it is supported by either of the other two.

It is more accurate to frame the rule to refer to the same period of "milk" or fosterage, which is taken to cover not more than two-years or two years and a half, rather than to refer to the bare period of time. If a woman gave suck to a male child A (not her own) at the end of one period of milk due to the birth of her female child B, then say 18 months old, and then after the lapse of 18 months during which she was divorced and married to another man, she gave birth to another child and at the same time suckled a female child C, (not her own) clearly A cannot marry B, as they are foster-brother and foster-sister. But it would be unreasonable to establish the fosterage relation between A and C, although the interval between their being suckled is only a year and a half, and it would be against the tenor of the Shariat authorities. It is true that the case of a virgin giving suck is mentioned (Hedaya, 70), but that is mentioned and treated as an exceptional case.

Unlawful conjunction.

38. A man is also forbidden to have two wives at the same time, so related to each other by consanguinity, affinity, or fosterage that if either of them had been a male they would have been prohibited from intermarrying. But there is no objection to marrying two such women successively, so that for instance, a man may marry his deceased, or divorced, wife's sister.

Baillie, 13; Hed. 28, 29.

Koran, iv, 26, " and [it is unlawful] that ye form a connection between two sisters—except bygones." The Hedaya records a tradition that the Prophet laid down the same rule respecting aunt and niece, and goes on to state generally that " it is not lawful for a man to marry two women within such degree of affinity as would render a marriage between them illegal if one of them were a man—and for the same reason, because this would involve confusion of kindred." I presume that the word " affinity " as here used by the translator is meant to include consanguinity, and if so, reading with this passage the saying of the Prophet—" Whatever is prohibited in consanguinity is prohibited in fosterage "—we get the result in the text.

Cases of two sisters being contemporaneously treated as the wives of the same man have actually come before the Courts. In *Shureefoonissa* v. *Khizoo-roonissa*, 3 S. D. A., 210 (1823), it was held by the Sudder Dewanny Adawlut, after consulting the law officers of the Court, that the marriage of a Muhammadan with his wife's sister, his wife being alive and undivorced, was null and void. Recently, however, the question was re-opened in a somewhat different shape, it being contended on the authority of the Fatawa Alamgiri (Baillie, p. 32), and of Mr. Baillie's own opinion, expressed at p. 157 (the passage occurring in a chapter that was more particularly his own work, see his Preface p. x), that such a marriage was only *fasid* (faulty), not *batil* (void), and consequently that issue born before a separation had been actually ordered by the judge, might inherit as legitimate together with the children of the first marriage. This view was rejected by the Calcutta High Court, *Aizunnissa Khatoon*, 23 Cal., 130 (1895), but was upheld by the Bombay High Court, dissenting from the Calcutta ruling: *Tajbi*, 41 Bom., 485 (1917). The distinction between void and voidable marriages is no doubt awkward in practice, but the interests of the issue should be borne in mind. The brand of illegitimacy is particularly unfortunate in India for a child, who ought not to be made to suffer unnecessarily for the mistakes or even misdeeds of its parents. From this point of view, as well as from the state of the authorities, it seems to the present Editor (A. Y. A.) that the Bombay view, which is embodied in the latest High Court ruling on the subject, has much to recommend it. See also Mr. Abdul Rahim, Muh. Jur., p. 330; and to note to sec. 39 A, below.

Difference of Religion.

39. (1) A Muhammadan woman cannot, as such, contract a valid marriage with a man who does not profess that religion.[1] Difference of religion.

(2) There can be no valid marriage according to Muhammadan Law with a woman who is not either a Muhammadan or a Kitabia, *i.e.* a Jewess or a Christian, believing in Scriptures the sacredness of which is acknowledged by Muhammadans.[2]

(3) A marriage between a Muhammadan man and a Christian woman must, in British India, be solemnised by, or in presence of, a Registrar appointed under the Christian Marriage Act, 1872, and in the form prescribed by that Act.[3]

(4) A marriage duly solemnized in England between a Muhammadan domiciled in India and a Christian [or any] woman is valid in England, but it cannot be dissolved either in England or in India at the instance of the husband.[4]

[1] Hed. 30, quoting K. ii, 221, and as to Majoosees or Fire Worshippers, quoting a text as from the Koran which I have been unable to verify. [The passage from the Hedaya only refers to the marriage of Moslem *men* with women of *other* religions, but Kor. ii, 221 deals with the marriage of both Moslem men and Moslem women. The *Majūs* are mentioned only once in the Kor., at xxii, 17, but not in connection with the marriage law. There is difference of opinion whether the *Majūs* are to be treated as *Kitabi* or not].

In Baillie, 40, we find it stated that " the marriage of a Mooslimah with a Kitabi is unlawful ; " the Hedaya, p. 30, not only does not expressly assert this, but has been supposed by some to imply the contrary when it says that " whenever either the husband or the wife is a Mussulman, the children are to be educated in the Mussulman faith." But this may and probably does refer only to the particular case discussed in the next sentence, which is that of a woman married as an infidel to another infidel and afterwards converted without her husband, and proves nothing as to the possibility of a Muslima born and bred marrying an infidel.

[2] *Ib.;* the Hedaya supports its statement as to the legality of inter-marriage between a male Mussulman and a Kitabiya by K. v, 8 ; " lawful to you are chaste women of those who believe, and chaste women of those to whom the Book has been given before you."

In *Abdul Razak*, 21 Cal., 666, and L. R., 21 Ind. App., 56 (1893), the question was mooted before the Privy Council on appeal, whether a Buddhist woman could be reckoned as a Kitabiya, but their Lordships declined to have the question argued, because there was no evidence before them directed to the point, the invalidity of the marriage having been common ground in the Court below.

The question whether a Hindu woman, retaining her ancestral religion could be reckoned as a Kitabiya, as believing in Scriptures of a sort, for the purpose of contracting a valid marriage with a Muhammadan, cannot well arise, because, from the Hindu point of view, such a marriage would *ipso facto* exclude her from the Hindu religious communion. Nor can a Hindu married woman, by declaring herself a convert to Islam, qualify herself to marry a Muhammadan during the lifetime of her Hindu husband, even though the latter may have " abandoned " her for her apostasy ; abandonment not being by Hindu Law equivalent to divorce. *Sundari Letani*, 32 Cal., 871 (1905). *Cf.* s. 74A below.

From the fact that a Muhammadan may take to wife a Christian or a Jewess, it was presumed *a fortiori* that a Sunni Muhammadan was not incapacitated from marrying a Shia, in *Syed Gholam Hossein Chowdhry* v. *Mussamat Setabah Begum*, 6 W. R., 88 (1866)

[3] Act XV of 1872, ss. 4, 5, and 38—59. The marriage may be solemnised according to such form and ceremony as the parties think fit to adopt ; but in some part of the ceremony each party must declare that he or she knows not of any lawful impediment, and each party must say to the other, " I call upon these persons here present to witness that I A. B., do take thee, C. D., to be my lawful wedded wife [*or husband*]. And by s. 88, " Nothing in this Act shall

be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into." Hence a Muhammadan woman cannot contract a valid marriage with a Christian man in this form without *previously* changing her religion.*

The Act does not in any way alter the Muhammadan Law as to the mutual rights of a Muhammadan husband and his Christian wife.

[4] This very unsatisfactory state of the law follows from *The King* v. *Superintendent Registrar of Marriages, Hammersmith,* ex-parte *Mir Anwaruddin,* L R., 1917, 1 K. B. D., 634. If a Hindu [or Muhammadan] domiciled in India and having a wife duly married to him in India according to his pe sonal law, marries an Englishwoman in England, his Indian marriage will not be recognised in England, but his English marriage will be recognised as a valid marriage: *Chetti* v. *Chetti,* L. R. [1908], P., p. 78. But his English marriage cannot be dissolved on his petition in England because he has not an English domicile *Le Mesurier* v. *Le Mesurier,* L. R. [1895], A. C., 517; nor can it be dissolved in India, by the Courts, because they would have no jurisdiction, the petitioner not being a Christian, nor the marriage solemnized in India; s. 2 of the Indian Divorce Act, IV of 1869; nor by his own act according to his own personal law as it cannot govern an English marriage, *Anwaruddin's* case, as above.

Marriages invalid but not void *ab initio.*

39A. Certain kinds of irregular marriages, namely,

(1) Marriages contracted without witnesses of the proper number and quality (s. 24);

(2) Marriages with women undergoing *iddat* (s. 31); and

(3) Marriages prohibited by reason of difference of religion (s. 39);

are not considered to be void from the beginning (*batil*), but merely invalid (*fasid*). It is the duty of the Court to separate the parties, on its attention being called to the irregularity, and the conjugal relation may also be terminated by a simple declaration on either side; but if consummation had previously taken place, the woman is entitled to dower (proper or specified, whichever is the least),† and if issue is born within two years after such consummation, the paternity is established in the husband, without claim on his part.

See Baillie, Book I, chap. viii, pp. 150 and 156. He includes under this head (besides some cases which cannot occur in British India) marriages in breach of "relative prohibitions;" but the Calcutta High Court held, in *Aizunnissa,* 23 Cal., 130 (1895), that marriage with the sister of an existing wife is absolutely void, and that the issue is illegitimate, and cannot be legitimated by acknowledgment—that process not being applicable to a case in which

* In previous editions it was wrongly assumed that she could be lawfully married under the Act without previous renunciation of Islam, while it was correctly stated that on that assumption the marriage itself, being an act of apostasy, would destroy for the future her legal status as a Muhammadan, saving only such vested rights as are protected by Act XXI of 1850.

† S. 42, *post.*

the paternity is known. The Bombay High Court has held the contrary: see above, note to sec. 38.

Jactitation of marriage.

39B. A suit for jactitation of marriage, that is, a suit to have it declared that the defendant is not, as she or he falsely alleges, the wife or husband of the plaintiff, will lie between Muhammadans in British India.

Mir Azmat Ali, 20 All., 97 (1897).

EFFECTS OF A VALID MARRIAGE.

Conjugal rights and duties depend mainly on contract, but partly on law.

40. Except as hereinafter mentioned, the rights and duties of husband and wife depend upon the terms of the marriage-contract, and may be defined in any manner agreed upon between the parties. But all the consequences hereinafter mentioned are considered to be implied in every marriage-contract, in default of express stipulation or manifest implication to the contrary; and the consequences specified in ss. 41. 42, 53(*a*), will follow in spite of any stipulation to the contrary.

In 1874 a very singular marriage-contract was brought under the notice of the Calcutta High Court, containing the following covenants on the part of the husband:—

"That I shall never give you troubles in feeding and clothing you; that I shall make over to you and to nobody else besides you whatever money I shall draw from employment; that I shall never exercise any violence on you; that I shall not take you anywhere else away from your home; that I shall not marry or make any *nika* without your permission; that I shall not prevent those men from visiting you who bear any relation to you, or come to you for conducting your law-suits, but they only and nobody except themselves will have the liberty of seeing you; that I shall do nothing without your permission; that if I do anything without your permission you will be at liberty to divorce me and realise from me the amount of *dinmohur* (dower) forthwith, and this *nika* will then be null and void;" *Poonoo Bibi*, 15 B. L. R., App., 5 (1874).

Unfortunately for the interests of legal science, the only clause upon the validity of which the Court was called upon to pronounce was that by which the husband bound himself to hand over all his earnings to his wife, and on this they compromised by ordering him to pay a fixed monthly sum. "It may be (they added) that some part of this agreement is void;" but which part, they did not attempt to decide.

DOWER.

Dower.

41. The fact of a marriage having been contracted involves as a necessary consequence that the wife can claim from the husband, by way of consideration, a sum of money

or other property[1] of not less value than the equivalent of 10 Arabian *dirhams*,[2] (estimated in modern Indian money to be about Rs. 16 at least).

Things not yet in existence, such as next year's crop ; things of which a Moslem is forbidden to make use, such as wine or pork ; and personal services to be rendered by the husband to the wife, do not count as property for this purpose.[3]

The technical Anglo-Muhammadan term for this consideration is " dower." [4]

[1] As to dower generally, see Baillie, Book I, chap. vii, p. 91 ; Hedaya, Book II, chap. iii. The germ of the law on this subject is to be found in the Koran, iv, 3 : " And give women their dowries freely ; and if they are good enough to remit any of it of their own free will, then enjoy it with a good conscience (literally, eat it). As to " other property," see Mishcat, II, 192. " That person who gives two handfuls of dates or meal, in a settlement on his wife, has made her lawful for him. . . ." A woman of the tribe of Beni Fazarah married on a settlement of a pair of shoes ; and the Prophet said to her, " Are you pleased to give yourself and your property for these two shoes ? " She said " yes." Then his Highness approved of the marriage.

[2] The legal minimum specified in the Arabian authorities and supported by a traditional saying of the Prophet (Hed. 44), is *ten dirms* or *dirhams*. In *Sugra Bibi*, 2 All., 573 (1877), ten *dirms* was treated as the equivalent of Rs. 107. No reason was assigned for this estimate, which is largely in excess of the highest of those given below ; and in *Asma Bibi*, 32 All., 107 (1909),* the probable source of the mistake was indicated, namely, that Rs. 107 is commonly taken by Muhammadans to be the equivalent of *five hundred dirms*, which tradition affirmed to have been the amount of the dower of the Prophet's daughter Fatima ; whereas the judges wrongly imagined that pattern marriage-contract to have been for only ten *dirms*. Taking the rupee at 1*s*. 4*d*., this would make the *dirm*=not quite 3½*d* of English money. But the rupee in 1877 was worth over 1*s*. 9*d*., and not many years before that, the standard value of the rupee was 2*s*. It was also at one time a good deal over 2*s*. Recently, the rupee has been as high as 2*s*. 9*d*., and its standard value has now (1920) been fixed at 2*s*. once more.

According to Wilson's Glossary, a *dirm*, or *dirham*,† is " a silver coin, usually weighing from forty-five to fifty grains, rather heavier than an English sixpence." The translator of the Hedaya says that " the value of the *dirm* is very uncertain. Ten *dirms*, according to one account, make about six shillings and eightpence sterling." Von Kremer treats it as roughly equivalent to the French franc. On the other hand, Mr. Shamachurn Sircar tells us that the *dirm* is " a silver coin generally in value about twopence sterling."

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* There would appear to be at least one mistake in the report of the judgment in this case. On p. 167 for " Rs. 35 " we must surely read " annas 35." After quoting the statement of the translation of the Hedaya (as quoted above) that ten *dirms* make about 6*s*. 8*d*. sterling, the judges say, p. 168, that " in the above passages the money value of a *dirm* is correctly stated, and is between three and four annas." This assumes the rupee to be worth 2*s*. 8*d*. ; 4 annas would then be equal to 8*d*., and ten times 8*d*. would be 6*s*. 8*d*.

† The word represents the Greek *drachma*.

According to Tornauw, Mosl. Recht. p. 42, a *dirhem* is the equivalent of forty-eight barleycorns, and 1170 *dirhems* make up the corn-measure called *saà*.

The best way to estimate the value of a *dirham* is to take its weight in silver, as fixed for the dealings between the Moslems and the State in the time of the canonists. After the time of the Khalifa Omar the weight of a *dirham* was fixed at $\frac{7}{10}$ths of a *mithqál*, *i.e.* $\frac{7}{10} \times 100$ grains = 70 grains. (Aghindes, Theories, p. 264, n. 1). As the Indian rupee contains 180 grains of silver the *dirham* would thus be equivalent to about $6\frac{1}{2}$ annas, assuming that the purchasing power of silver was the same in modern India as in Omar's Arabia. But it is not open to doubt that the purchasing power of silver is much less now in India than it was at the earlier date in Arabia, though it is difficult to establish a quantitative relation. Assuming that the purchasing power of silver is only one-fourth what it was, with reference both to time and place, the modern equivalent of a *dirham* would be one rupee and ten annas. The minimum of ten *dirhams* would then be Rs. 16-4. As a matter of fact, the real equivalent would probably be much higher, as the purchasing power of silver was probably a great deal more than 4 times greater in juristic Arabia. It is estimated that as late as Akbar's time in India, the purchasing power was 6 or 7 times as high as now (Mr. W. H. Moreland's article on the Value of Money at the Court of Akbar, Journal of the Royal Asiatic Society, 1918, p. 383). Where the disproportion is so great, the divergence between the currency value and the silver value of the rupee may be neglected. See also note to s. 429 below.

It does not help us very much to read of eighty *dirhams* having been a common price for a camel in the time of the Prophet (Mishcat-ul-Masabih, ii, p. 168); for the price would, of course, vary greatly, not only from time to time, and from place to place, but from camel to camel. It may be noted, however, that the equivalent of 80 *dirhams* at Re. 1-10 would be Rs. 130. About Rs. 130 would be a fair price for an average riding camel in modern Panjab. Some light, however, is thrown on the subject by the statement in the Hedaya that the sum of ten *dirhams* was fixed because it had been already settled as the limit below which a theft would not entail the Koranic punishment of amputation; just as the limit of twelve pence under old English law distinguished "grand" from "petty" larceny, and just as thefts below the value of forty shillings may be dealt with summarily under the modern English Law. "The law" says the Hedaya (p. 44), "enjoins a dower with a view to manifest respect for the wife, wherefore it must be fixed, in its smallest degree, at such a sum as may be respectable."

The dower settled by the Prophet on each of his wives is said to have been five hundred *dirms*, with one exception, that of Omm Habibah, given to him by the ruler of Abyssinia, she being the widow of one of his followers who had fled thither, and died as a Christian. In this peculiar case, according to the Mishcat, the dower was fixed at 4000 *dirms*—not 400, as stated in Matthew's translation of that work, and in the Tagore Lectures of 1891-92, vol. i, p. 112, article 734. The Arabic original having been examined by the judges in the case of *Asma Bibi*, above referred to, they pointed out this and another mistranslation, and correctly surmised that these two mistranslations were the source of the erroneous statement, in the third edition of this work, to the effect that the dower of the Prophet's wives was "said to have been five hundred *or four hundred dirms*" (Mishcat, II, p. 101).

[3] Baillie, 94; Hed. 50-52. Traditions contradicting both this rule and that of the ten *dirms* are given in the Mishcat, but they are not likely to prevail in India against the Fatawa Alamgiri and the Hedaya.

[4] This term is a somewhat unfortunate rendering of the Arabic *mahr*, but is too firmly established in the Anglo-Indian legal vocabulary to be dislodged by anything short of legislation. See Introduction, p. 59.

42. If the amount of dower is specified in the marriage-contract, not being less than the legal minimum, the wife is entitled to that amount. If no dower which the law recognises as such is specified in the contract, or even if it has been expressly stipulated that there shall be no dower, the wife is entitled to "proper dower," *i.e.* to an amount to be fixed at the discretion of the Court. For its guidance in exercising this discretion the Court should take evidence as to what has usually been settled on other female members of the wife's father's family, and then allow for any advantages or disadvantages attaching to this particular woman.[1] It is doubtful how far any account, if at all, should be taken of the means and social position of the husband, and certain that these must not be the primary consideration.[2]

"Specified" or "Proper."

[1] Baillie, 95; Hed. 53; and see *Sugra Bibi*, 2 All., 573 (1877), where a decree was passed for the full amount of dower settled by a husband who had at the time no reasonable prospect of paying it.

[2] See *Nujeemooddeen Ahmed*, 4 W. R., 110 (1865). In s. 5 of the Oudh Laws Act, 1876 (see s. 44 below, the Indian Legislature has expressly laid down, for a limited class of cases, two governing considerations for estimating a reasonable amount of dower, *viz.*, the means of the husband and the status of the wife.

If a specified or fixed dower is alleged, the Court will not go into the question of a "proper dower" (*Mahr-ul-misl*): *Fazl Khan* v. *Karm Begam*, 49 Panj. Rec., 390 (1914).

43. If a dower has been specified which is less than the legal minimum, the wife can only claim to have it made up to that minimum.

Rule when the "specified" dower is too small.

Baillie, 93; see also Hed. 44, where the opinion of Ziffer, that the agreement should be treated as void, and that the wife should be allowed her proper dower, is noticed only to be rejected.

44. The following enactment respecting the amount of dower is in force in the province of Oudh.

Rule as to excessive dower in Oudh.

"Where the amount of dower stipulated for in any contract of marriage by a Muhammadan is excessive with reference to the means of the husband, the entire sum provided in the contract shall not be awarded in any suit by decree in favour of the plaintiff, or by allowing it by way of set-off, lien, or otherwise to the defendant; but the amount of dower to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of the

wife. This rule shall be applicable whether the suit to enforce the contract be brought in the husband's lifetime or after his death."

This is s. 5 of the Oudh Laws Act, 1876. See *Mirza Suleman Kadr*, 21 Cal., 135 (1893).

The mere fact of a marriage having taken place in Oudh does not authorise a Court in another province, in which the parties are domiciled at the time of the suit, to apply the Oudh enactment in abatement of the stipulated dower. *Zakeri Begam*, 19 Cal., 689 (1892); *Rukia Begam*, 32 All., 477 (1910). In both cases the wife was domiciled in Oudh at the time of the marriage, though the husband's domicile, which became the wife's after marriage, was in another province.

Post-nuptial settlement binding.

45. An agreement for dower is none the less binding on the husband because made after the solemnisation of the marriage.

Kamarunnissa, 3 All., 266 (1884).

"Prompt" or "deferred" dower.

46. It being usual to stipulate that one portion of the dower shall be "prompt," *i.e.* payable on demand, and the remainder "deferred," *i.e.* payable only on termination of the marriage by death or divorce, both ancient and modern decisions are conflicting as to the presumption to be made where the marriage-contract is silent on the point, the Madras decisions being in favour of presuming the whole to be "prompt," but the balance of recent authority at Allahabad and Bombay being in favour of fixing the proportion with reference to such circumstances as the position of the wife, the custom of the locality, and the amount of the dower settled.

In the 1st and 2nd editions of this work it was stated that "it is the duty of a Civil Court, when applied to in a case in which no such stipulation has been either expressly made or expressly negatived, to presume that some portion at least, if not the whole, was intended to be prompt, and to fix that portion with reference to the position of the wife, and the arrangements usually made on marriages of female members of her family." This statement was based mainly on two Allahabad rulings of 1879, *Eidan* v. *Mazhar Husain*, 1 All., 483 (1877) and *Taufik-un-nissa* v. *Ghulam Kambar*, 1 All., 506, in neither of which cases was any notice taken of an earlier P. C. ruling to the effect that the whole should be presumed to be prompt; (*Mirza*) *Bedar Bukht*, 19 W. R., 315 (1873); nor of a still earlier Madras case, *Tadiya* v. *Hasanebiyari*, 6 Mad. H. C., 9 (1871). In the third edition it was stated that the balance of recent authority was in favour of presuming the whole to be prompt where the marriage-contract was silent on the point. This can hardly be said now, in view of the decision in *Umda Begam*, 33 All., 291 (1910). The judgment in this case disposes of the P.C. decision in *Mirza Bedar Bukht*, and of the Madras decision in *Masthan Sahib*, 23 Mad., 371 (1900) by the remark that in both these cases the parties were Shias, and that the Shia law differs from the Hanafi on this point. Now

it is undoubtedly the fact that the parties were Shias in the P. C. case, and their Lordships took notice of this fact in discussing another point, but their ruling on this particular point was based solely on Macnaghten, p. 59, Princ. vii, 22, which purports to be a statement of Hanafi law. The report of *Masthan Sahib* also contains a statement that the parties were Shias, but by whom made is not clear. As printed, counsel for the appellant, contending *against* the view that the whole is presumed to be prompt, is made to say, " Syed Ameer Ali, in his work on Muhammadan Law, draws a distinction between Shias and Hanafis. *These parties are Shias.*" This would of course have been fatal to his own argument. The probability is, therefore, that the punctuation is wrong, and that the remark was really interpolated by the judge. But however that may be, the decision is based on the inexpediency of disturbing the law as laid down in *Tadiya* v. *Hasanebiyari*, which is erroneously stated to have been quoted with approval by the P. C.

As regards Bombay, there is the case of *Fatma* v. *Sadruddin*, 2 Bom. H.C., 291 (1865), in which " the more approved rule " was said to be that given in Baillie, p. 126, and it was therefore held that the lower Court had committed no error in law by treating only a third of the dower as prompt. And there is also the recent case of *Husseinkhan Sardarkhan*, 35 Bom., 386 (1910), the headnote to which, " *Fatma* v. *Sadruddin* followed," is misleading. It should have been " distinguished." What Chandavarkar, J., said of the earlier decision in question was—" it lays down no inelastic principle of law, but merely points out what, in the circumstances of the case, was an equitable rule to follow." And he accordingly held that on the facts of the case before him the lower Courts were right in treating the whole as prompt.

The conflict of modern rulings reflects a controversy between Macnaghten and Baillie. Macn. p. 59, Princ. vii, 22, Precedents, p. 278, case 29, footnote and Appendix, asserts what we may now call the Madras doctrine to be undoubtedly the law, and refers to the Hedaya and the Sharh-i-Viqaya. Baillie, p. 127, note, relies on the Kazi Khan as quoted in the Fatawa Alamgiri, and on the Durr-ul-Mukhtar, and claiming that the Sharh-i-Viqaya is also on his side. Ameer Ali, M.L. vol. II, p. 387, adds a reference to the Radd-ul-Muhtar.

The Egyptian Code of Hanafi law (Art. 73) makes the deferred portion of the dower payable after a certain interval of time, depending on the custom of the locality, without reference to the termination of the marriage ; Clavel, I, p. 83, II, p. 278. Such an arrangement might no doubt be made in British India, if the parties so choose, but I have not found any instance of it in the reports.

The husband may, if he chooses, treat the deferred dower as prompt, so as to constitute a valid consideration for an immediate transfer of property to his wife ; and such transfer will not be void on account of fraudulent preference (unless actual insolvency is involved) merely because his object was to defeat the claim of another unsecured creditor ; *Suba Bibi* v. *Balgobind Das*, 8 All., 178 (1886) ; *Hamidunissa* v. *Nazirunnissa*, 31 All., 170 (1909).

Where the silence of a marriage-contract on the point is not presumed to make the whole dower prompt, a suit brought by the wife during her husband's life for the prompt portion of her dower will be no bar to a subsequent suit for the recovery of the deferred portion : *Umda Begam*, 33 All., 291 (1911).

Limitation in suits for dower.

47. The period of limitation for suits to enforce payment of dower is three years, which is reckoned—

(*a*) In the case of prompt dower, from the time when the dower is demanded and refused, or (where during

the continuance of the marriage no such demand has been made) from the time when the marriage is dissolved by death or divorce ;

(*b*) In the case of deferred dower, from the time last mentioned.

Limitation Act, 1908, Sched. I., 1st division, 103, 104,—reproducing the corresponding articles in the Act of 1877, which had removed all possibility of doubt on a point that under the Limitation Act of 1871 had required a decision of the Privy Council (*Ameeroonnissa* v. *Moorad-un-nissa*, 6 Moo. I. A., 211 (1855)) to settle it ; namely, that a wife runs no risk of her claim to prompt dower becoming barred by reason of her forbearance to claim it in her husband's life-time. See also *Khajarannissa*, L. R., 2 Ind. App., 235 (1875).

As to the right of a widow in possession of her husband's property to retain possession until her dower is satisfied, see s. 162, *post*.

Remission of dower by wife.

47A. The remission of dower by wife to husband is expressly sanctioned by the Koran,[1] and is therefore not void for want of consideration, as it would be under the general law of India ; and the same rule has been applied to remission in favour of the heirs after the husband's death.[2]

[1] K. iv, 4. The Madras High Court has held, *per* Sheshagiri Ayyar, J., in *Abi Dhunimsa Bibi*, 41 Mad., 1026 (1918), that the remission by a wife who has attained her majority by Muhammadan Law, but not under the Indian Majority Act (IX of 1875), s. 2, is invalid under the Indian Contract Act (IX of 1872). It is respectfully submitted that that ruling requires reconsideration. S. 2 of the Indian Majority Act expressly makes an exception in the case of minors who " act " (*inter alia*) " in the matter of dower." The Court's ruling that for a wife to remit a dower is not " to act in the matter of dower " is in conflict with the plain wording of the Act. If the Legislature had intended that the only action contemplated was action which would benefit the minor's property, it would have said so. If the minor according to the Act is competent to initiate proceedings in fixing a dower, she ought to be competent to remit dower where such remission is sanctioned by her personal law.

[2] *Jyani* v. *Umrao*, 34 Bom., 612 (1908).

Wife's right of refusal.

48. In addition to her right to recover the prompt dower by regular suit, the wife may refuse to admit her husband to sexual intercourse, to obey his orders, or even to live in the same house with him, so long as it is unpaid ; and this without forfeiting any right to be maintained at his expense, or her right of inheritance as his wife. But it seems to be now settled that she cannot exercise this right of refusal after sexual intercourse has once taken place with her free consent.

For the view of Abu Hanifa, that the wife can exercise her right of refusal even after consummation, see

Macn. Prec. chap. vi, p. 218 (where even Abu Yusuf is referred to as taking the same view) ;

Abdul Shukkoar v. *Raheemoonnissa*, 6 N. W., 94 (1873) ;

Eidan v. *Mazhar Husain*, 1 All., 483 (1879) ; and

Wilayat Husain v. *Allah Rakhi*, 2 All., 831 (1880). It is also the view embodied in the Egyptian Code, Art. 213.

For the contrary view, attributed to the " two disciples," see *Abdul Kadir* v. *Salima*, 8 All., 149 (1886), a very elaborate judgment, delivered on behalf of the Full Bench by Mahmood, J., who discussed and expressly overruled the two judgments last cited.

This last judgment was in its turn vigorously impugned by the late Moulvi Samee-Ullah, District Judge of Rae Bareilly, Oudh, in a judgment delivered by him in the case of *Rasulan* v. *Mirza Naim-Ullah*, and published by himself (Allahabad, 1891), and in the 1st and 2nd editions of this work it was contended that reasons of justice and expediency preponderated on the side of Abu Hanifa and the earlier British decisions. It was, however, followed in *Kunhi* v. *Moidin*, 11 Mad.,372 (1888) ; in *Hamidunessa Bibi*, 17 Cal.,670 (1890) ; and in *Bai Hansa* v. *Abdullah*, 30 Bom., 122 (1905), so that the law must now be considered to be settled.

The conflicting views of Abu Hanifa and the two disciples are fully set out in the Hedaya (II, iii, p. 50), but the English translation was unfavourably criticised by Mahmood, J., in *Abdul Kadir* v. *Salima*. See also Baillie, 125.

There has never been any conflict, either of Anglo-Indian decisions or of the old authorities, as to the right of refusal *before* consummation. It was, however, found necessary to re-affirm it so late as 1911 ; *Husseinkhan* v. *Sardarkhan*, 35 Bom., 386.

48A. A wife is not debarred from suing her husband or any other promisor, for money agreed to be paid to her in consideration of the marriage, by the fact that, being a minor at the time of the marriage, she was no party to the contract ; at all events if certain immovable property is specifically charged with the payment of the allowance, so as to create a trust under which she is the sole beneficiary.

Contract with father of child-wife, whether she can sue on after majority.

Khwaja Muhammad Khan v. *Husaini Begam*, 32 All., 410 (1910) ; s.c. L. R., 37 Ind. App., 152. The judgment of the P. C., so far as material to the present point, was as follows :—

" First, it is contended, on the authority of *Tweddle* v. *Atkinson* (1861), 1 Best & Smith's Rep. (Q. B.), 393, that as the plaintiff was no party to the agreement she cannot take advantage of its provisions. With reference to this it is enough to say that the case relied upon was an action of assumpsit, and that the rule of common law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff ; she is the only person beneficially entitled under it. In their Lord-

ships' judgment, although no party to the judgment, she is clearly entitled to proceed in equity to enforce her claim.

"Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts."

As regards the first paragraph of the above extract, in which their Lordships state in effect that the plaintiff is entitled to proceed in equity because certain property has been specifically charged with the payment of her allowance, this seems to be much the same as saying that it is a case of trusteeship, and thus comes under the third exception mentioned in Pollock on Contracts (p. 197 in 5th edition) to the common law doctrine affirmed in *Tweddle* v. *Atkinson*. If so it would not be necessary that the property should be immovable, so long as it was of a sufficiently permanent nature to supply an annual income.

Are we to infer from the last paragraph that their Lordships would have allowed the plaintiff's claim even if there had been no property specifically charged with the payment. They might perhaps have arrived at this conclusion in more than one way. Thus

(1) They might have held that, though the Muhammadan law of contract is in general superseded by the enacted law of British India, a contract of this particular kind is so closely connected with marriage that it should be governed by the religious law of the parties, and, failing specific authority on the point from the Muhammadan law sources, by the usage of Indian Muhammadans; or

(2) Even if the case were to be governed by the general law of India, they might have pointed out that there is nothing in the Indian Contract Act, nor in any other Act, expressly declaring that a contract is only enforceable at the suit of one of the parties to it, and that the silence of the Indian Codes does not necessarily let in the English Common Law to fill the gap; or lastly,

(3) The contract having been made with the plaintiff's father as her guardian, she being then a minor, they might have held that she was virtually a party to the contract, though not expressly named as such.

None of these points, however, was argued before the P. C., counsel for the respondents not being called upon.

RECIPROCAL RIGHTS AND DUTIES OF HUSBAND AND WIFE.[1]

Duties of Wife.

Duties of wife.

49. Subject to the abovementioned right of refusal for non-payment of dower, the wife is bound—

(*a*) To reside in the house of the husband; but not necessarily to follow him about from place to place, wherever he may choose to travel.[2]

(*b*) To admit the husband to sexual intercourse whenever required at reasonable times and places, with due regard to health and decency;[3]

(*c*) To obey all his other reasonable commands; and

(*d*) To observe strict conjugal fidelity from the time of the marriage-contract (whether the dower has or has not been paid), and to refrain from all undue familiarity with strangers and all unnecessary appearances in public. It is not an unnecessary appearance in public to go out to enforce or defend her rights against other parties, or to go on pilgrimage (Baillie, 450).

The question, what is undue familiarity or unnecessary publicity, will depend in each case partly on the social position of the parties, and partly on local custom.[4]

[1] See on this subject generally, Baillie, 13 and 437–450; Macn. Princ. vii, 7, p. 57.

[2] Baillie, 438: "If a woman should refuse to move with her husband from city to city at his pleasure, she was not entitled to maintenance according to the older opinions; but in 'our' times (17th century A.D. ?) a husband has no right to insist on his wife's going about with him on journeys;" cf. the Egyptian Code, Art. 208.

[3] See the definition of a rebellious wife (*nashizah*), Baillie, 438. That the husband's right is limited by considerations of health and decency, follows from what is said about "retirement" at p. 98: "Retirement is valid or complete where there is nothing in decency, law, or health to prevent their matrimonial intercourse."

[4] See s. 53, *post*, and Baillie, as there referred to.

Note that the wife's subjection to marital control relates exclusively to matters of personal behaviour; her contractual and proprietary independence remains as absolute as if she were unmarried.

It is also worthy of note that the duties of a wife do not include, except in urgent necessity, the most elementary duty of a mother, that of suckling her own children. "If the child be an infant at the breast, there is no obligation on the mother to suckle it, because the infant's maintenance rests upon the father, and in the same manner the hire of a nurse; it is possible, moreover, that the mother may not be able to suckle it, from want of health or other sufficient excuse, in which case any constraint on her for that purpose would be an act of injustice. What is here advanced proceeds upon a supposition of a nurse being easily procured; but where this is not the case the mother may be compelled to take that office upon herself lest the infant perish." Hed. 146. She must not, however, take pay for performing this duty while she is a wife. After she has been divorced irreversibly and completed her *iddat*, she may be hired for the office as well as any stranger, and has the preferential right if she is willing to perform it for a lower or the same fee. One wife may take pay for suckling the child of a co-wife. *Ib.*

Remedies of husband.

50. The remedies of the husband against a disobedient wife are—

(*a*) To divorce her in one of the ways hereinafter described; [1]

(*b*) To refuse to maintain her; [2]

(*c*) To institute a civil suit for restitution of conjugal rights,[3] which may result in the attachment of her property, or in her detention in the civil prison for a term not exceeding six months, or both, should she refuse to obey the decree. But the Court may, at the time of passing the decree or at any time afterwards, order that the decree shall not be executed by detention in prison.[4]

[1] Though he can do this without alleging disobedience or any other reason, he would have to justify his conduct to public opinion. The Hedaya says (p. 73) :—" Our doctors on the other hand say that divorce is in itself a dangerous and disapproved procedure, as it dissolves marriage, an institution which involves many circumstances as well of a temporal as of a spiritual nature ; nor is its propriety at all admitted, but on the ground of urgency of release from an unsuitable wife." The argument is directed against hasty divorces like those mentioned in s. 61 (*c*) & (*d*) below.

[2] Baillie, 438. " If a woman be *nashizah* or rebellious, she has no right to maintenance until she return to her husband." Here it is clear from the context that the words " return to her husband " are meant to imply complete conjugal submission, and this condition must therefore be satisfied before she can succeed in a civil suit for maintenance. It may not be quite so indisputable that the Legislature intended the same construction to be put upon the words " refuses to live with him " in s. 488 of the Code of Criminal Procedure. There have been conflicting decisions on the converse question whether an offer on the part of the husband to " maintain his wife on condition of her living with him " must include admitting her to live with him *as his wife*, in order to make it a sufficient offer wihin the meaning of that section, so as to exempt him from the statutory liability to pay an allowance in lieu of maintenance, the Madras High Court having pronounced for the affirmative, *Marakkal*, 6 Mad., 371 (1883), and that of Bombay for the negative, *In re Gulabdas*, 16 Bom.. 269 (1891).

The right of a husband to refuse to maintain a wife who refuses to live with him is no answer to a claim by her against his father for payment of an allowance under an agreement made between the two fathers, as guardians of the bride and bridegroom at the time of the marriage, they being then minors ; *Khwaja Muhammad Khan* v. *Husaini Begam*, 32 All., 410 (1910).

[3] *Buzloor Ruheem*, 11 Moo. I. A., 551 (1867) ; *Abdul Kadir* v. *Salima*, 8 All., 149 (1886). In suits for restitution of conjugal rights, the Allahabad High Court (*per* Piggott and Walsh, JJ.) accepted the principles laid down in *Armour* v. *Armour*, 1 A. L. J., 318 (1914) as applicable between Muhammadans, and refused the husband a decree, where there was ill-treatment on his part short of physical cruelty, and the Court was of opinion that by a return to his custody the wife's health and safety would be endangered : *Hamid Husain*, 40 All., 332 (1918).

[4] Civil Procedure Code, 1908, Order XXI of the Scheduled Rules, ss. 32 and 33 (1). Under the Code of 1882 the husband who had obtained a decree for restitution could demand as of right the imprisonment of a wife who refused to obey the decree.

In the 2nd and 3rd editions attention was directed at this point to the bearing of the Law of Limitation then in force on actions for restitution of

conjugal rights, etc. Under Schedule II, appended to the Limitation Act, 1877, Nos. 34 and 35, the period fixed for a suit for the recovery of a wife or for the restitution of conjugal rights was two years; to run in the former case from the time when possession of the wife was demanded and refused, and to run in the latter case from the time when restitution was demanded and refused by the husband or wife, being of full age and sound mind. But s. 23 of the Act itself enacted that, "in the case of continuing breach of contract, and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues." And the Chief Court of the Panjab dealing with the very similar provisions of the Limitation Act of 1871, had laid it down that "according to Muhammadan Law the unjustifiable withholding of her person by the wife is a breach of the contract of marriage, *and a breach which continues so long as her person is so withheld*, consequently that a suit of this kind cannot be barred by limitation where the parties are Muhammadans": *Gaizni* v. *Mehran*, Panj. Rec. vol., xiv, p. 157 (1879). The same view was taken by the Allahabad High Court in the Hindu case of *Binda* v. *Kaunsilia*, 13 All., 126 (1890), the only difference being that the wife's refusal of cohabitation was held to be under that law not a breach of contract but a wrong independent of contract. In the very elaborate judgment of Mahmood, J., it was admitted that this construction "impaired and frittered away the efficacy of Arts. 34 and 35 of the Schedule," but it was argued that the consequence of holding them applicable would be still more intolerable, implying that the legislature intended to effect by a side wind a material alteration in the matrimonial laws of both Hindus and Muhammadans. There were two Bombay decisions to the same effect. *Hemchand* v. *Shiv* (1883, unreported) and *Bai Sari* v. *Sankla Hirachand*, 16 Bom., 715 (1892), giving the judgment in the preceding case in a footnote. But subsequently the current of opinion began to change. In *Fakirgauda* v. *Gangi*, 23 Bom., 307 (1898), the Bombay High Court referred to the question as one of doubt and difficulty which it was not then necessary for them to decide, and in *Dhanjibhoy* v. *Hirabai*, 25 Bom., 644 (1901), the Full Bench expressly dissented from the rulings in *Bai Sari's* case and in *Binda* v. *Kaunsilia*, holding that a suit under the Parsi Marriage and Divorce Act by a wife for restitution of conjugal rights was time-barred when restitution had been demanded by her and refused by the husband, both being of full age and sound mind, more than two years before the commencement of the suit. This ruling was followed at Madras in the Hindu case of *Saravanai Perumal*, 25 Mad., 436 (1905), and at Calcutta in the Muhammadan case of *Asirunnissa Khatun*, 34 Cal., 79 (1906). On one point, however, all the differing judges were agreed, namely that this part of the Act was ill-drawn, and incapable of being construed in a satisfactory manner. Accordingly in the Limitation Act of 1908 an attempt has been made to meet these complaints. Section 23 re-appears with the same wording as before, but Nos. 34 and 35 disappear from Schedule II. Hence the only time-limit now to be considered is the six months prescribed by s. 120 for suits not otherwise provided for; and even this would seem to be nullified by s. 23, if the principle laid down in *Gaizni* v. *Mehran* and other cases is upheld, namely that there is a continuous breach of contract from the time when a Muhammadan husband or wife withdraws from cohabitation to the time when it is resumed.

51. The right to deprive a disobedient wife of her liberty, and the right to inflict moderate personal chastisement, are clearly recognised by the unmodified Muhammadan Law;[1] but it is doubtful whether either, very doubtful

Right to confine and chastise doubtful.

whether the latter, can safely be exercised under modern Anglo-Muhammadan Law.[2]

[1] Koran, iv, 34 : " But those whose perverseness ye fear, admonish them and remove them into bedchambers and beat them ; but if they submit to you, then do not seek a way against them."—Baillie, 13.

From a tradition preserved in the Mishcat-ul-Masabih (Vol. ii, p 113), and reproduced by Mahomed Yusuf (vol. i, p. 120), it would seem that at one time—presumably before announcing the above revelation the Prophet tried the experiment of absolutely prohibiting the beating of wives. But " then Omar came to the Prophet and said, ' Wives have got the upper hand of their husbands from hearing this.' Then his Highness permitted beating of wives. Then an immense assemblage of women collected round the Prophet's family, and complained of their husbands beating them. And his Highness said, ' Verily a great number of women are assembled near my family, complaining of their husbands ; and those men who beat their wives do not behave well. He is not of my way who teaches a woman to stray, and who entices a slave from his master.' "

[2] The marital power of correction, similar to that permitted by the English Common Law, has never been expressly taken away by the Indian Legislature ; but in order to determine whether it has been abolished by implication we must look at the Penal Code in conjunction with the enactments on which the retention of the Muhammadan Personal Law depends ; while with reference to the power of restraint some account may also have to be taken of the past and present state of the English law.

The Penal Code provides, by sections 319 and 323, punishments for " voluntarily causing Hurt, or Grievous Hurt," and by sections 339 to 342 for " Wrongful Restraint " and " Wrongful Confinement," and the only question open to argument is whether the husband can shelter himself under the General Exception of s. 79. " Nothing is an offence which is done by any person who is justified by law in doing it." The law which is to justify him must be either the Muhammadan Personal Law or the general Territorial Law of India. As regards the latter, whether we look for it in enactments of the Indian Legislature, or in the principles of English Law stripped of what is clearly unsuitable to Indian conditions, it cannot be shown to confer on husbands generally as such any right of personal chastisement. For though as a matter of fact the English Common Law was formerly administered on the understanding that such a right did exist, the legal theory is that the modern decisions adverse to the right did not repeal the old law, but expressed more correctly what always had been the law ; and although these modern decisions are not binding as authorities in India, yet, if the question had to be argued either as one of " justice, equity, and good conscience," or as one of transplanted English Law, they would naturally carry considerable weight.

Whether the Muhammadan Personal Law can be successfully invoked depends upon the terms of the Civil Courts Acts. Does the enactment that the Muhammadan Law is to be the rule of decision in civil suits respecting marriage necessarily imply that whatever invasions of personal freedom and security are justified by that law as incidental to the marriage relation are " justified by law " within the meaning of s. 79 of the Penal Code ? When the question was, What constitutes the offence of " voluntarily disturbing an assembly lawfully engaged in religious worship," within the meaning of s. 296 of the Penal Code ?—Mahmood, J., held that, whether the devotions of the congregation were in fact disturbed or not by a particular response being uttered in a loud voice, the accused were protected by s. 79 if this mode of uttering it could be shown to be sanctioned by the Muhammadan Ecclesiastical Law,

Queen-Empress v. *Ramzan*, 7 All., 461 (1885), at p. 476. Yet in *Abdul Kadir* v. *Salima*, 8 All., 149 (1886), the same learned judge, having occasion, in the course of his argument, to notice the resemblances between the English and Muhammadan laws, remarked incidentally that, " even under the former the old authorities say that the husband may beat his wife ; and if in modern times the rigour of the law has been mitigated, it is because in England, *as in this country*, the criminal law has happily stepped in to give to the wife personal security which the matrimonial law does not," thereby apparently implying that s. 79 of the Penal Code would not let in the Muhammadan matrimonial law so as to take wife-beating out of the purview of s. 319. The analogy is not quite so close as here represented ; the change in England was not the result of any interference on the part of the criminal tribunals with the Courts for matrimonial causes, but was a change in the practice of the criminal tribunals themselves ; the matrimonial Courts of Lord Stowell's time did by no means affirm the legality of moderate marital discipline, still less expressly recommend it like the passage of the Koran above quoted ; they merely said, in the words quoted by Mahmood, J., in the sentence immediately following that already quoted, that " there must be actual violence of such a character as to endanger personal health or safety, or a reasonable apprehension of it," *in order to justify a judicial separation*. It is also true that the case before the learned judge, with reference to which the remarks above quoted were made, was a suit for restitution of conjugal rights, not a criminal charge of Hurt, and that even the question, what sort of evidence would support a plea of " cruelty " in answer to such a suit, though raised by the original pleadings, was not actually then before the Court. Nevertheless, even a *dictum* on such a piont contained in a judgment which was adopted in its entirety by the Full Bench of the Allahabad High Court, must be allowed to carry very considerable weight, and I am not aware of any authority to the contrary.

Practically, I imagine that in India, as in England, a wife has but little inducement to bring before any Court, still less to take up to the High Court, any case of marital violence which is not sufficiently serious, or sufficiently unprovoked, to afford ground for judicial separation, permanently relieving her from the obligation of living with the offender.

The same arguments *pro* and *con* apply to the power of forcible restraint, with only this difference, that, supposing the Moslem husband to be driven off the ground of his personal law, he may still perhaps succeed in the contention that *this* power is sanctioned by the general Territorial Law of India, having been generally supposed to exist in England until it was negatived by a single quite modern decision, based on grounds which may possibly be considered inapplicable to India. See *The Queen* v. *Jackson*, L. R., 1 Q. B., 671 (1891).

The Egyptian Code of Hanafi law (Art. 209) permits the husband to inflict on the wife " a moderate disciplinary penalty " when she commits a fault or reprehensible act for which the law has not prescribed any legal penalty ; but declares that he must never use violence towards her, even on grave provocation (*même pour un motif valable*). Clavel (vol. I, p. 165) gives as an example of permitted disciplinary measures, depriving her for a time of his society, or of her proper share of it in competition with his other wives, if any. The same writer goes on to say that the wife-beating husband can be imprisoned, and also incur sentence of divorce, and mentions a case in which the Court of Algiers actually pronounced the latter sentence against a husband who had severely beaten his wife found in the act of adultery. But that was under Maliki Law and the Hanafi text on which Clavel is commenting does not support that view but merely says, " il sera passible d'une peine correctionelle, plus ou moins grave selon la faute commise."

Consequences of wife's adultery.

52. Under Anglo-Muhammadan Law a wife incurs no penalty or disability by committing adultery, except that, if she was living apart from her husband at the time, and he had previously been ordered to allow her maintenance under s. 488 of the Code of Criminal Procedure, the order must be cancelled on proof of the adultery.

Of course she is liable to be divorced for this reason, but she may also (as already mentioned) be divorced for incompatibility (see note 1 to s. 50), and she does not for this or any other reason forfeit the deferred portion (if any) of her dower.

By the Muhammadan Criminal Law (as already noticed, p. 5), fornication by a married person of either sex is a capital offence, and is punishable with scourging in the case of an unmarried person of either sex. This gradation is not found in the Koran, which in one passage (xxiv, 2) simply prescribes a hundred stripes for " the whore and the whoremonger," and in another (iv, 15) directs that *women* guilty of whoredom are to be " kept in separate apartments until death release them, or God affordeth them a way of escape." " But " adds the next verse, " if they turn repentant and amend, then leave them alone ; for God is forgiving, compassionate." The Hedaya traces its very different regulation to precedents set by the Prophet, one in the case of a male, and the other in the case of a female, both married. On the other hand, the evidence required by the Koran (*viz.*, four eyewitnesses) for the conviction of an adulteress is so unlikely to be obtained, and the punishment for making a false charge is so severe, that this branch of the law must at all times have been almost a dead letter. The strongest practical check on adultery in Muhammadan countries seems to be the leniency with which the law regards homicide by an injured husband. Abu Jaafar Hinduanee, being asked whether a man finding another in adultery with his wife, might slay him, replied, " If the husband know that expostulation and beating will be sufficient to deter the adulterer from a future repetition of his offence, he must not slay him, but if he see reason to suppose that nothing but death will prevent the repetition of the offence, in such case it is allowed to the husband to slay that man ; and if the woman were consenting to his act, it is allowed to her husband to slay her also." Hed. 203. Against this may be set a tradition preserved in the Mishcat (ii, p. 127 ; M.Y. i, p. 128), which represents the Prophet as expressly forbidding such self-revenge ; though it is true that it also represents the follower to whom the prohibition was addressed as openly protesting that he should disregard it if the occasion arose, and being let off with a surprisingly mild rebuke for his audacity. The story is so told as to convey the impression that the killing of an adulterer is considered to be wrong, but yet so natural as hardly to deserve punishment. The Company's Courts, administering the Muhammadan criminal law under the advice of Indian law-officers, were in the habit of acquitting in such cases, and even, prior to Reg. IV of 1822, in the case of a brother killing a sister detected in fornication. Morley, vol. i, Crim. L., 121, 124, 136, 151, 152. A learned Frenchman, M. Seignette, emphatically denies that it is in any way sanctioned by the Maliki Law as received among the Arabs of Algeria. Code Musulman, Introd. p. li. On the other hand, in Perron's Précis de Jurisprudence Musalmane, purporting to be a close paraphrase of the standard Maliki text-book, it is said that the slayer of a Mussulman is exempt from retaliation if, and only if, he can produce the almost impossible proof of the fact of adultery which the Mussulman Law requires ; vol. v. p. 847.

All this branch of Muhammadan Law is, of course, superseded by the Indian Penal Code, which provides (by s. 497) punishment for the male paramour of a married woman, but not for the woman herself, nor for either of the parties concerned, when the connection is between a married man and an unmarried woman.

Duties of Husband.

53. The husband is bound— Duties of husband.

(*a*) To maintain his adult wife in a manner suitable to his wealth, or at least to the mean between his wealth and hers if she is the poorer[1], quite irrespective of her ability to maintain herself out of her own property, so long as she is undivorced and obedient, and whether obedient or not if she has the right of refusal for nonpayment of dower ; but he is not bound to maintain a wife who refuses herself to him without reasonable cause or is otherwise disobedient ;[2]

(*b*) If he has more wives than one, to provide each with a separate sleeping apartment, and to give to each as far as possible an equal share in his society and equal treatment in other respects ;

(*c*) In any case to allow her the use of an apartment from which she may exclude all persons except her husband himself ;

(*d*) To allow her to visit and be visited by her parents, or children by a former husband, with reasonable frequency, and to allow her to visit, and be visited by, her own blood relations (within the prohibited degrees) at least once a year. But he is under no legal obligation to allow her to visit, or be visited by, strangers, or to go out to marriage feasts, public baths, and the like.[3]

[1] Baillie, 441, 442 ; Hed. 140. Some Hanafi lawyers agreed with Shafei that only the husband's position should be considered. " If the woman be of a family where females are not accustomed to do menial services for themselves, she ought to be supplied with food ready dressed, or the means of baking or cooking, and in any event should be furnished with all necessary and proper utensils. . . . Proper maintenance comprehends food, raiment, and lodging ; and food is meal or flour, water, salt, wood (for cooking ?), and oil. As a husband should give his wife a sufficient supply of food, so ought he also to furnish her with such condiments as are usually eaten therewith. He ought also to furnish her with whatever is necessary to cleanliness according to the customs

of the place, and sufficiency of water to wash her person and clothes. But he is not bound to give her what ministers to delight and enjoyment, . . . nor even to supply her with medicine in sickness, nor the hire and fees of a physician, bleeder, or shaver (hair-cutter ?) ; " Baillie, 442 ; the Shafeites, however, distinctly mention " medicines, the fees for medical and surgical attendance, and any special food that may be necessary during illness " as among the things the husband is bound to provide, Minhaj, III, 81 ; and see Baillie 448, and Minhaj *ib.*, as to dress, service, etc. If the husband be wealthy, he must also maintain his wife's servants, they being essential to her ease and comfort (Hed. 142). On this principle, it would be reasonable to hold that medicines and medical attendance are included in maintenance. The wife cannot validly release her right to future maintenance ; Baillie, 446. A stipulation for a monthly payment in lieu of maintenance is valid ; *Ib.*

[2] If the wife is too young for conjugal intercourse, the Hanafi view is that her maintenance is not incumbent on the husband ; according to Shafei, it is ; Hed. 141 ; Baillie 437. But see *post*, note following s. 396. In *Kolashun Bibee*, 24 W. R.,Cr.,44 (1875), the cognate, but not precisely identical question, whether a Muhammadan husband can be ordered to maintain a child-wife under the Code of Criminal Procedure, was referred to as doubtful, but not decided, the magistrate's order being set aside on the ground that the father, who was the real complainant, had not been examined.

[3] Baillie, 442–450. It is here tacitly implied, and is expressly stated in the Egyptian Code (Art. 185), that she is not entitled to have her children by her former husband permanently residing with her, without her present husband's consent ; and we shall see hereafter (s. 208) that the fact of re-marriage disentitles her to the custody of such children, as against their grandmother or any remoter legal guardian, unless her present husband is related to them within the prohibited degrees.

Do they include conjugal fidelity ?

54. The husband does not (in British India) incur any legal penalty, criminal or civil, by failing to observe conjugal fidelity, except that the keeping of an idol worshipping concubine in the same house with the wife may (perhaps) be regarded as so serious an outrage on her religious feelings as to constitute " cruelty " in the legal sense of the term, which would justify the wife in refusing to live with him, and give her a claim to maintenance notwithstanding such refusal.[1]

[1] In *Lala Gobind*, 6 B. L. R., appx., 85 (1871), the High Court of Calcutta took this view of the converse case of a Hindu husband forcing the company of a Muhammadan concubine on his wife. But it would clearly not be open to a Muhammadan wife to set up this plea if the concubine were a Christian or a Jewess. (See above, s. 39.)

Remedies of Wife.

Remedies of wife.

55. The legal remedies open to the wife against the husband are the following :—

(*a*) She may sue him in a Civil Court for maintenance, and the decree may be enforced by attachment of his

property, or by six months' imprisonment, or both; and in case of his absence, and of there being no conveniently realisable property, the Court may authorise her to borrow money on his credit. But she cannot in such a suit recover arrears of maintenance for any period anterior to the decree, unless it be under an express agreement; and the decree for future maintenance must be conditional on the continuance of the marriage.[1]

(*b*) In case of actual or threatened violence of a serious kind (and possibly in case of gross violation on his part of the conjugal obligations imposed by the Muhammadan Law), she may refuse to live with him without rendering herself liable to a suit for restitution of conjugal rights.[2]

(*c*) Having so ceased to reside, or having been turned out or deserted, she may obtain from a magistrate an order for maintenance not exceeding 50 rupees monthly. But this order will be cancelled if she is afterwards found to be living in adultery, or if without any sufficient reason she refuses to live with her husband, or if they are living separately by mutual consent; and whether cancelled or not, it will become inoperative on the expiration of her *iddat* after a valid divorce.[3]

(*d*) She has (probably) the same remedies, civil or criminal, that any stranger would have against any acts (other than sexual intercourse) which would amount to Hurt, Criminal Force, or Wrongful Restraint, under the Penal Code.[4]

[1] Baillie, 443; Hed. 149; *Abdool Futteh Moulvie*, 6 Cal., 631 (1881). As to the effect of an express agreement for maintenance, see *Yusoof Ali Chowdry*, 15 W. R., 296 (1871). The Shofeis allow arrears of maintenance in any case; see s. 397A below. The Muhammadan Law contemplates the enforcement of conjugal duties, not only by such processes as are open to an Indian Civil Court, but also by the direct infliction of corporal or other punishment at the discretion of the Kazi. It also contemplates the settlement of matrimonial disputes by arbiters chosen from the two families. Hence we find in the law sources a multiplicity of domestic detail which it seems unnecessary to reproduce in such a work as the present.

In the case of an absent husband, the Kazi can award maintenance to the wife from his estate, but in that case he must take security from her as a precaution in case the amount awarded was not due or was in excess of the amount due. Hed. 348 (incidental remark top of second column).

[2] *Buzloor Ruheem*, 11 Moo. I. A., 550 (1867) : *Abdul Kadir* v. *Salima*, 8 All., 149 (1886).

[3] The Code of Criminal Procedure, 1898, s. 488 (4). As to the effect of divorce, see s. 78 (5).

[4] See above s. 51, and the Indian Penal Code, ss. 319, 339, 349, 350.

Her right to sue her husband for breach of contract would (outside the Presidency Towns) depend ordinarily on the general law of India; but the Court might have to consider whether there was anything in the Muhammadan matrimonial law to invalidate the particular contract in question. In *Beebee Hurron* v. *Sheik Khyroollah*, Fulton, 361 (1838), a suit was entertained for breach of a contract made by a Muhammadan with his first wife not to marry a second wife, and nominal damages given; why merely nominal does not appear. The question was treated as one of pure Muhammadan Law, having arisen in Calcutta, and long before the passing of the Contract Act.

Special Stipulations which may not be embodied in a Contract of Marriage.

56. A condition that the wife shall, though adult, be at liberty to live in the house of her parents, is void, and the husband is entitled notwithstanding it to insist on the wife residing with him in his own house, provided he has paid the dower, or the prompt portion of it.

Condition that wife need not live with her husband, void.

Macn. 256, case viii of the Precedents of Marriage, etc. As to a wife under the age of puberty, see s. 110, *post*. See also Hed. 49, from which it would appear that, though such a stipulation does not debar the husband from exercising his marital rights, yet, if made in consideration of the wife accepting something less than her "proper dower," it is so far valid that in case of its violation she is entitled to have the dower made up to the proper amount. In *Hamidunnessa*, 17 Cal., 670 (1890), the question whether such a stipulation could in any case afford an answer to a suit for restitution of conjugal rights was considered, but not decided, the wife's plea being rejected on the ground of a want of definiteness in the stipulation itself. It has recently been decided that no such condition has any effect in Hindu Law (*Tekait Mon Mohini*, 28 Cal., 751 (1901), but the spirit of the two systems is so different that this will not help us much.

57. A condition, analogous to the "option of inspection," or "option of defect," in the Muhammadan Law of Sale, that one party shall be at liberty to cancel the marriage on discovery of certain defects in the other party, is void.

"Option of defect," void.

Explanation.—The defects here spoken of are such as would not, apart from special stipulation, render the marriage void *ab initio*, or afford ground for a judicial divorce.

Baillie, 21. As to judicial divorce, see ss. 72 to 77, *post*. Such stipulations are valid according to the Maliki law, as administered by the French Courts in Algeria (Clavel, vol. i, pp. 121, 122). The Shafeis are divided on the point; see s. 401. Even among the Hanafis it is quite permissible to make an extra amount of dower conditional on the truth of assertions made before marriage as to the wife's physical qualifications (*ib.* I, 61).

58. If a marriage is expressly declared to be contracted for a specified period—as for so many years, months, or days, not the time-limit only, but the marriage itself, is altogether void.

"Temporary marriage" void.

Baillie, 18; Hed. 33. "Our doctors" seem to have overruled the opinion of Ziffer, that the contract itself would hold without the time-limit. Yet on the next page of Baillie's Digest we are told that a marriage contract with a condition attached that the wife shall be repudiated by the end of a month (which seems practically equivalent to a temporary marriage) is valid, the condition being void according to Muhammad the disciple.

As to the Shia Law, see Chap. XIV, *post*.

Agreements during Marriage.

58A. An agreement for future separation between a Muhammadan husband and wife is void as being against public policy.

Bai Fatma, 37 Bom., 280 (1912). The main ground taken was: s. 23 (not 25 as in the head-note) of the Indian Contract Act (IX of 1872), and English law; but Batchelor, J., said: "It is, as I understand it, as much the policy of the Mahomedan law as of the English law, that people who are married should live together and not apart."

Position of the Survivor on Death of Husband or Wife.

59. On the death of the husband his wife or wives are free to marry again, and on the death of a wife her husband is free to complete his number, subject only to the prohibitions on the ground of affinity hereinbefore described, and to observance of the *iddat*, or period of waiting,[1] on the wife's part. The deferred portion of dower (if any) becomes payable by the husband's inheritors to the wife, or by the husband himself to the wife's inheritors, as the case may be, subject in the latter case to the husband's right to retain his own share as one of the inheritors, and the shares of any children of his by her who may happen to be infants under his guardianship.[2] The widow (unlike a divorced wife) has no

Re-marriage after death of husband or wife.

Wife's claim to deferred dower.

right to maintenance out of her husband's estate during *iddat*, apart from what she may be entitled to as deferred dower or under the law of inheritance.[3] Nor are the heirs bound to allow her to remain during that interval in her late husband's house, though it is indicated as the most proper place of residence for her, if permitted and not otherwise unsuitable.[4]

[1] S. 31, *ante*.

[2] See s. 46, *ante*, as to deferred dower, and the chapters on Guardianship, Inheritance and Wills.

[3] *Aga Mahomed*, 25 Cal., 9 (1897). This was a Shia case; but Hed. 145, the Hanafi authority, was relied on as well as Baillie, ii, 170, and, as a matter of fact, Baillie, i, 452, which was not referred to, states the Hanafi rule in the same way. So does the Egyptian Code, Art. 331. The other side relied on a text of the Koran, ii, 240, which appears to allow the widow a year's maintenance, but the P. C. declined on principle to go behind the standard commentaries. See on this, note 2 to s. 16, *ante*. The principle, however, of allowing the widow some maintenance for a stated time is so reasonable, that, when the Koran expressly enjoins maintenance for a year, with occupation of the house, a review by the Privy Council of their previous ruling is not impossible, and, it is submitted, is necessary. The two verses of the Koran dealing with the subject (ii, 241, 242) seem to place the widow in a superior position to the divorced wife in this respect, which again is consonant with reason.

[4] Baillie, 359. "A *mooâtuddah* should keep her *iddat* in the house where she was residing at the time when the separation from her husband, *or his death*, took place." . . . "If she is under any apprehension of the house falling down, or is alarmed for her property, or the house is a hired one, and she is unable to pay the rent during the *iddat* for death, there is no objection to her removing. And if the house belonged to her husband, *and he has died, leaving her a widow*, and her share of it (by inheritance from him) is sufficient for her accommodation, and entire seclusion from the other heirs who are not within the forbidden degrees to her, she should live in her share of the house; but if the share be insufficient for these purposes, or the heirs turn her out, she may lawfully remove from it; while if they allow her to occupy their portions of the house for rent, and she is able to pay it, she has no right to remove from the house" See also note 3 above, and the verse of the Koran quoted there.

CHAPTER III.

DIVORCE.

Either retain them with humanity, or dismiss them with kindness.—*Koran*, chap. ii, v. 229.

60. The husband may divorce his wife without judicial intervention by following certain formalities to be hereinafter mentioned ; but the transaction is called by a different name, and requires different formalities, according as it takes place against her will or by mutual consent. The wife cannot divorce herself from her husband without his consent, except under a contract, pre-nuptial or post-nuptial, empowering her to do so ; but she may, under some circumstances, obtain a divorce by judicial decree.

Different kinds of divorce.

A divorce proceeding simply from the husband, or from the wife or some third person in pursuance of authority given by the husband, is called *talák*. A divorce by mutual agreement, with mutual release of rights, is called *mubaraat*. There is an intermediate form, the *khula* in which the motion for the divorce originates from the wife, but she has to give some valuable consideration for the husband to release her (Hed. 113). Anglo-Muhammadan Law has no special technical term for judicial divorce.

See remarks above, at p. 61

See, on divorce generally, Baillie, pp. 203–360, where the subject is treated with great minuteness, as was to be expected from the opening statement that " there are thirteen different kinds of *firkut*, or separation of married parties, of which seven require a judicial decree, and six do not." For the purposes of Anglo-Indian practice these thirteen kinds may be conveniently reduced to three ; the *talák*, the *khula*, and the judicial divorce ; the first being sub-divided as shown in the next section, *mubaraat* going with *khula*.

Mr. F. B. Tyabji (Principles of Muhammadan Law, p. 81) points out the different senses in which the word " divorce " has been used,—*e.g.* to mean " dissolution of marriage," or " the formula or pronouncement of divorce," or a particular method of dissolving marriage.

Those portions of the second chapter of the Koran out of which this extensive branch of the law has been developed, are set out at length in Appendix D.

Talâk.

61. The divorce called *talák* may be either irrevocable (*báin*) or revocable (*raja'i*). A *talák báin*, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A *talák báin* may be effected by words addressed to the wife[1] clearly[2] indicating an intention to dissolve the marriage, either

(*a*) Once, followed by abstinence from sexual intercourse, for the period called *iddat* (s. 31) ; or,

(*b*) Three times during successive intervals of purity, *i.e.* between successive menstruations, no intercourse taking place during any of the three intervals ; or,

(*c*) Three times at shorter intervals, or even in immediate succession ; or,

(*d*) Once, by words showing a clear intention that the divorce shall immediately become irrevocable.

The first-named of the above methods is called *ahsan* (best) ; the second *hasan* (good) ; the third and fourth are said to be *bidaat* (sinful), but are nevertheless regarded by Sunni lawyers as legally valid.[3]

In cases (*b*) and (*c*), not only is the existing marriage dissolved, but a new marriage can never be contracted except under the conditions specified in s. 78 (6). In cases (*a*) and (*d*) the existing marriage relation is irrevocably dissolved, after completion of the *iddat*, but there is nothing to prevent the parties from subsequently becoming reunited by a fresh marriage contract.[4] And the same effect will be produced immediately, and without any taint of irregularity, by a single pronouncement *before consummation*.[5]

[1] Where a husband simply pronounced three *taláks* before a family council in the absence of his wife, and without expressly naming her, it was held that there was no divorce. *Furzund Hossein*, 4 Cal., 588 (1878). But the decision would probably have been different if the divorce had been pronounced before a public official authorised to receive and record divorces, and if endeavour had been made to communicate the divorce to the wife, which were frustrated by her keeping out of the way, which was the case in *Sarabai* v. *Rabiabai*, 30 Bom., 537 (1905). And in *Ful Chand* v. *Nazab Ali Chowdhry*, 36 Cal., 184 (1908), it was decided, after consideration of these two cases, that it is not necessary for the wife to be present when the *talák* is pronounced. See also *Asha Bibi*, 23 Mad., 22 (1909).

[2] Ambiguous expressions may be made clear by evidence showing the intention with which they were uttered ; *Hamid Ali* v. *Imtiazan*, 2 All., 71 (1886), where the ambiguous expression was, " thou art my cousin, the daughter of my uncle, if thou goest "—which was taken to mean, " if you disobey this command of mine, I shall henceforth recognise no other relationship between us than the cousinship which exists independently of our marriage," and therefore to constitute a divorce, which became final when the prescribed period had elapsed without its being revoked. The case has nothing to do with the *zihar* formula described in s. 75, the point of which is that the husband compares his wife to a relative *within* the prohibited degrees.

The actual words are immaterial so long as they show a clear intention to dissolve a marriage. Where witnesses depose that a divorce was effected in their presence, it is for the party alleging the contrary to prove by cross-examination that the words used were insufficient and incomplete to support a valid divorce : *Wahid Khan*, 36 All., 458 (1914).

It is not necessary that the *talák* or words of repudiation should be addressed directly to the wife, but they must refer clearly to the wife. If they be not communicated to her, a question may possibly arise whether she is not entitled until she comes to know of the divorce to bind her husband by certain acts such as pledging his credit for obtaining the means of subsistence. But the *talak* is good. *Asha Bibi*, 33 Mad., 22 (1909).

[3] Baillie, 207 ; Hed., 73. *Abdul Ali* v. *Ismailji*, 7 Bom., 180 (1883)

The Hedaya (73) says of the *talák bidaat* that it holds good, " but yet the divorcer is an offender against the law." Form (*c*) of *Talák-i-bidaat* (called in the Report " bedai " form) has been held by the Allahabad High Court (following the Bombay ruling just referred to) to be a perfectly legal form and to be irrevocable : *Amir-ud-din*, 39 All., 371 (1917). In this case the formula of repudiation was repeated three times in immediate succession.

Baillie, 205, 290 ; see also 232, note 2 : " there are two kinds of irrevocable repudiation ; the *khufee*, or light, and the *ghuleez*, or aggravated, which is triple and prevents marriage." In Baillie, 223–226, various examples are given of expressions which would effect at once a single but irrevocable divorce, *e.g.* " when a person says, ' Thou art repudiated like the number of such a thing,' mentioning a thing which, like the sun and moon, has no number—one repudiation takes effect, and it is irrevocable, according to Aboo Huneefa." And so if the comparison is to the number of the hairs of the devil—it not being known whether the devil has any hairs or not. But for these examples, the description at p. 207 of the " sinful " divorce would rather seem to imply that it would not be *báin* without the idle form of triple repetition. In *Sarabai* v. *Rabiabai*, 30 Bom., 537 (1905), a single pronouncement before the Kazi and witnesses was held to be possibly sinful, but certainly *báin*, though the husband died before expiration of the wife's *iddat*.

[5] Baillie, 206, 226 ; Hed., 83.

62. A *talák* divorce may be effected by writing as well as by word of mouth.[1] Such writing must ordinarily be addressed to, and reach, the wife. Divorce by writing.

Exceptions:—

(1) For the purpose of estimating the duration of the *iddat*, a divorce by writing is considered to take effect from the date of the writing, not from the date of receipt,

in default of words showing a different intention[2]; and

(2) An instrument of divorce delivered to the wife's father,[3] or to the town kāzi (where there is such an officer),[4] may in some circumstances have the same effect as if delivered to the wife herself.

[1] Baillie, Book III, chap. ii, s. 6, pp. 232–235. Though divorce by word of mouth is perfectly valid, and is assumed in the old text-books to be the most natural and ordinary method, yet, as the Calcutta High Court has observed, "Where a divorce takes place between persons of rank and property, and where valuable rights depend upon the marriage and are affected by the divorce, one would certainly expect that the parties, for their own security, would have had some document which would afford satisfactory evidence of what they had done;" *Gouhur Ali*, 20 W. R., 214 (1873).

[2] Baillie, 233. *Sarabai* v. *Rabiabai*, 30 Bom., 537 (1905).

[3] Baillie, 233, where it is said that if the wife's father tears up the letter without showing it to her, the divorce will take effect if he had the general disposal of her affairs, but not otherwise; *Waj Bibee* v. *Azmut Ali*, 8 W. R., 23 (1866).

[4] *Sherif Saib* v. *Usanabibi Ammal*, 6 Mad. H. C., 452 (1871); *Sarabai*, *ubi supra*.

Revocation of inchoate divorce.

63. Until the divorce has become irreversible in one or other of the ways indicated in s. 61, the husband may at any time restore the conjugal relation, either by express words[1] or by simple renewal of sexual intercourse.[2]

[1] Baillie, 285; Hed. 103. Both books state distinctly that the revocation is independent of the consent of the wife, though the following passage of the Koran ii, 231 (of which the writers are careful to cite only the first clause) rather seems to imply the contrary. "But when ye divorce women, and they have fulfilled their prescribed term, either retain them with humanity, or dismiss them with kindness; *and retain them not with violence*, so that ye transgress; for he who doth this surely injureth his own soul." Formal notice by the husband, before witnesses, of his intention to take back his semi-divorced wife, is recommended as the proper course, but is not strictly obligatory.

[2] Baillie, 287; Hed., 106, note

Divorce under compulsion or intoxication valid. By minor or lunatic, invalid.

64. A divorce is none the less legally valid if pronounced under compulsion or in a state of voluntary intoxication, though it is invalid if pronounced by a youth who has not attained puberty, or by a lunatic.

Baillie, 208; Hed. 75. This rather harsh rule is peculiar to the Hanafi lawyers, who ground it on a saying of the Prophet, "Every *talák* is lawful except that of a boy or a lunatic." It was reluctantly recognised by the

Calcutta High Court in *Ibrahim Moolla* v. *Enayet ur Ruhman*, 12 W. R., 460 (1869) ; s.c. 4 B. L. R. (A.C.),13. Ameer Ali, M. L. vol. II, p. 419, boldly suggests that a Hanafi, who has divorced his wife under coercion, should, on recovering his freedom of action, place himself under the Shafeite rules, and thereby invalidate the divorce.

The only argument of " our doctors " in favour of the rule apart from a too literalistic interpretation of tradition is the rather feeble one that divorce can never be justified except by the necessity of escaping some greater evil, and therefore that it makes no difference whether the evil to be escaped from is the intolerable companionship of an unsuitable wife, or the threatened violence of a third party.

65. Abstinence from sexual intercourse for a period of not less than four months in pursuance of a vow to that effect on the part of the husband (called *īla*) effects a single irreversible divorce. *Ila.*

Baillie, 294–302 ; Hed., 109.

Macn. Princ. vi, 27, p. 60. He gives no precedents on the point, nor have any such cases found their way into the Reports since his time.

Koran, ii, 226 : " Those who swear off from their women, they must wait four months ; but if they break their vow, God is forgiving and merciful."

66. The husband may confer a power of repudiation on his wife or on some third party, and a divorce will take effect if, and when, the power so conferred is exercised.[1] But so far as the wife is concerned, Delegated option of repudiation.

(*a*) In default of words indicating a different intention, the legal presumption is that her option was intended to be exercised immediately * or not at all ;[2] and

(*b*) She cannot in any case give herself a more complete kind of divorce than the husband intended, or than the expressions used by him would naturally imply, though she may reply in such a way as to effect a less complete divorce than he intended.[3]

[1] Baillie, III, chap. iii. " Of *Tufweez*, or committing repudiation to another." The instances given of delegation to a third party are (1) the very curious one of a debtor permitting a creditor to repudiate his (the debtor's) wife in the event of the debt remaining unpaid (p. 249), the case contemplated being apparently that of a creditor coveting his debtor's wife, and proposing to marry her when divorced ; (2) permission to one of two or more wives to

* By " immediately " is here meant at the same *majlis*, or meeting ; *i.e.* while the parties are still in presence of each other, and while the woman's attention has not been diverted to any other business. It is like the option of acceptance in a sale of goods. Hed. 248.

divorce a rival wife (p. 252); (3) permission to the father or other guardian of the wife to put an end to the marriage and take her home (p. 254).

Hedaya, Book IV, chap. iii, is substantially to the same effect, and refers to a passage of the Koran, xxxiii, 28; which, however, is, on the face of it, not a general command, but a revelation purely personal to the Prophet, and is only cited incidentally to introduce a tradition as to the effect of particular expressions used in exercising this option. The text is as follows:—

"Oh, thou prophet! say to thy wives: 'If ye be desirous of the life of this world and its adornments, come, I will give you them to enjoy, and I will let you range handsomely at large! But if ye be desirous of God and His Apostles and of the abode of the hereafter, verily, God has prepared for those of you who do good a mighty hire!'"

Professor Palmer explains that "Muhammad being annoyed by the demands made by his wives for costly dresses and the like, offered them the choice of divorce or of being content with their usual mode of living. They chose the latter." For a modern instance of Tafwiz, made subject to a condition, but held to be unrestricted as regards time, see *Ashruf Ali v. Ashad Ali*, 16 W. R., 260 (1871).

[1] Baillie, 236, for the general rule; 240, 243, for examples of a more extended time-limit. The Hedaya says (91–92): "If a husband say to his wife, 'divorce yourself,' he is not at liberty to retract, as his expression involves a vow. . . . If, however, the woman rise from her seat, or remove from the place, the words of the husband, as above, transferring the power of divorce to her, are annulled, their force being confined to the situation where the offer is made. . . . If a husband say to his wife, 'divorce yourself when you please,' she is at liberty to divorce herself either upon the spot, or at any future period." If a man say to another, 'divorce my wife,' this is a power of agency, and may be retracted, unlike the power given to the wife, which she exercises as from herself and not as an agent.

[3] The traditional classification of the forms of *Tafwiz* is a threefold one: (1) *Ikhtiyar* (choice); (2) *Amr bi Yad* ("the affair is in your hands"); (3) *Mashiat* (pleasure, "as you please"); but the differences meant to be indicated by these apparently synonymous expressions are not made much clearer by the multifarious examples in the books. Clause (*b*) of the text represents the nearest approach to a general principle that I have been able to deduce therefrom. It is at all events supported by such examples as the following:—

(i) If a man say to his wife, "divorce (*talák*) yourself once," and she gives herself *three* divorces, nothing takes place according to Abu Hanifa; *one* reversible * divorce according to the two disciples. Hed., 92.

(ii) If he says, "give yourself three divorces," and she gives herself one only, it (that is, one reversible divorce *) takes place accordingly. *Ib.*

(iii) If a man desire his wife to repudiate herself by a reversible divorce, and she divorce herself irreversibly, on the contrary, that mode of divorce takes place which was desired by the husband. *Ib.*

(iv) If a man say to his wife, "divorce yourself thrice, if you please (*mashiat*)," and she give herself one divorce, no effect whatever follows, because the meaning of his words is, "*if* you desire three divorces, repudiate yourself," and the woman giving one only,

* Because the word *talák*, being the word used in the Koran in the passage which permits two, but not three, revocations, must be taken to denote a reversible divorce unless qualified by some such adjective as *báin*.

it appears that she does not desire three, and hence, the condition not being fulfilled, a divorce does not take place. *Ib.*

67. A stipulation on the part of the wife, that she shall be allowed to divorce herself in certain contingencies, is valid, at all events if the contingencies specified are such as would render the step a reasonable one. It seems to be immaterial whether such an agreement is ante-nuptial or post-nuptial.

Stipulation by wife for right of divorce.

Hamidoola v. *Faizunnissa*, 8 Cal., 327 (1882). By an instrument executed by the plaintiff upon his marriage with the defendant, the plaintiff agreed to allow the defendant to be taken to her father's house four times a year, and to erect a house for the defendant and live with her there, should any disputes arise between her and the persons living in the same mess with the plaintiff. He also agreed not to beat or ill-treat the defendant, and to pay her Rs. 400 on account of dower-money on demand. The agreement further stipulated that, if the plaintiff violated any of the conditions contained in it, the defendant should have the power of divorcing herself from him. This power the defendant exercised, alleging ill-treatment and a refusal to pay the dower-money. The plaintiff thereupon sued for restitution of conjugal rights. The Munsif gave the decree, considering that the Muhammadan Law did not give the wife the power of divorce. The Subordinate Judge, however, held, on the authority of *Ashruf Ali* v. *Ashad Ali*, 16 W. R.,260 (1871), and *Badarunnissa* v. *Mafiattala*, 7 B. L. R., 442 (1871), that a Muhammadan husband can invest his wife with the power of dissolving the marriage; and his decision was confirmed by the High Court. Prinsep, J., said: "The Muhammadan Law on the subject which has been laid before us provides for the delegation of the power of divorce by the husband to the wife on certain occasions by word of mouth, but it in no way, so far as it has been laid before us, limits the exercise of that power to those occasions. It would seem rather that, by providing how the wife should act, it recognises her power to divorce her husband, if he should give her the power to do so. All the occasions specially provided for are what I may term casual. We are aware of no reason why an agreement entered into *before marriage* between persons able to contract, under which the wife consented to marry on condition that under certain specified conditions, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Muhammadan Law, should not be carried out. We may observe, too, that the conditions under which it is stipulated that this power should be exercised by the wife are certainly not opposed to the Muhammadan Law on the subject."

In the two other Calcutta cases above referred to, the contingency specified was the taking of a second wife or concubine. Both these cases were decided shortly before the passing of the Indian Contract Act, 1872, s. 26 of which declares that "every agreement in restraint of the marriage of any person, other than a minor, is void;" but the Legislature could not have intended to invalidate agreements in restraint of polygamous marriages, seeing that such marriages are positively prohibited by the English Law, whence this clause is borrowed, and are merely tolerated, not by any means encouraged, by the Koran and the Shastras.

It is a fact that nearly all of what is said on the subject in the Fatawa Alamgiri and the Hedaya has reference to permission, given by the husband to the wife *after marriage*, to divorce herself at her option in specified contingencies

(Baillie, Book III, chap. iii ; Hed. 86 (Book IV, chap. iii.)) ; but it would seem that if a post-nuptial permission, given without any consideration, is binding on the husband, it must be so *à fortiori* when it is a term in the marriage-contract itself ; and this is placed beyond doubt by a passage in another part of Baillie's Digest, p. 19. " A man marries a woman on condition that she is repudiated, or that her business as to repudiation is in her own hands. Moohummud has said, with regard to such a case, that the marriage is lawful, but the word ' repudiated ' (*talik*) is void, and that the business is not in her hands. The lawyer, Aboo Leeth, however, has said that this is so when the husband has taken the initiative and said, ' I have married thee on condition that thou art repudiated ; ' but that *when the initiative is on the part of the woman*, who says, ' I have married myself to thee on condition that I am repudiated,' or ' *that the business is to be in my hand to repudiate myself when I please*,' and the husband says, ' I have accepted,' the marriage is lawful, and the repudiation takes effect, or is in her power, as the case may be."

In *Ayatunnissa Beebee*, 6 Cal., 23 (1908), the question was raised whether a wife, who has power given her by the marriage-contract to divorce herself in the event of her husband taking a second wife, loses her option by failing to exercise it the very moment she knows that he has done so, and it was answered in the negative. The passages in Baillie, p. 236 (250, 2nd edit.), and Hed. 90, which lay down that the option must be exercised before the termination of the meeting at which it is given, or, in the case of a conditional permission, immediately on the happening of the specified contingency, were disposed of (1) by the remark that those writers were dealing only with post-nuptial transactions,* and (2) by pointing out that a second marriage is not a single but a continuing wrong to the first wife. This last argument seems to be the sounder of the two.

Stipulation that second marriage shall operate as divorce, doubtful.

68. The precise effect of a clause, said to be commonly inserted in modern contracts of marriage, that, should the husband marry another wife, the first marriage shall become *ipso facto* void, and the wife shall be entitled to recover her dower as upon divorce, has not yet been judicially determined, and seems open to question according to the Muhammadan authorities.

See Ameer Ali, M. L. vol. ii, p. 171, who states it to be " usual nowadays among Mussulmans *even of the polygamous sect.*" It appears to me that there might be considerable difficulty about the literal carrying out of such a provision. Is the first wife liable to be instantly turned out of the house, and to lose her claim for maintenance, either statutory or civil, while she is preparing to take legal proceedings for the recovery of her dower ? And even assuming that by " the marriage becoming *ipso facto* void " is meant that she is placed exactly in the position of a divorced woman, bound to observe the *iddat*, and entitled to maintenance during that period, it is still quite conceivable that her feelings, or her interests, or both, might be opposed to an immediate divorce, and it seems hard that it should be in the power of the husband to force that position upon her by taking a second wife. At all events she would surely be better advised to stipulate in the form which has already received judicial

* Both the counsel for the respondent and the learned judges referred to the present work (p. 168 of the 2nd edn.), as though I had given some support to this distinction—why, I am at a loss to imagine. I did not advert to the question now under discussion at all.—R. K. W.

sanction (see note to the preceding section), securing the option to divorce herself or not as may suit her convenience when the contingency occurs.

69. A *Khula* divorce is accomplished at once by means of appropriate words spoken or written by the two parties or their respective agents, the wife offering, and the husband accepting, compensation out of her property for the release of his marital rights; it is irreversible (*báin*), but does not, unless thrice repeated, debar the parties from re-marrying by mutual consent without the condition mentioned in s. 78 (6). *Khula.*

[1] See, as to Khula generally, Baillie, pp. 303–320; Hed. 112–117. The primary authority is the Koran, ii, 229: "It is not lawful for you to take from them anything of what you have given them, unless both fear that they cannot keep within God's bounds. So if ye fear that ye cannot keep within God's bounds, there is no crime in you both about what she ransoms herself with."

The exaction by the husband of compensation in excess of the value of the dower is considered to be harsh and improper, but not illegal. Hed. 113. In *Vadaka Vitil Ismal*, 3 Mad., 347 (1881), the wife sued for divorce on the ground of the husband's impotence and cruelty. The district judge found that there was no evidence of either,* and therefore held that the suit ought to be dismissed; but before actually passing a decree to that effect he suggested to the husband that, considering the determined and not unnatural aversion of the wife, it would be better to grant her a Khula divorce on terms to be settled by the local kazi. The husband having reluctantly consented, and the kazi having fixed the sum to be paid by the wife, the judge passed a decree confirming the settlement. The High Court held, on appeal, that the pressure exercised by the Lower Court did not render the divorce invalid.

Khula, like *talák*, is valid though given under compulsion (Baillie, 319); the compulsion contemplated in both cases is evidently unlawful duress, and does not touch the question discussed under s. 77, as to whether any Court has jurisdiction to compel the husband to give a *khula*.

[2] Baillie, 303; Hed. 112.

70. Failure on the wife's part to make good the consideration agreed upon in a *Khula* divorce does not invalidate the divorce so as to enable the husband to sue for restitution of conjugal rights, but only entitles him (1) to plead the release on his part as a defence to her claim for dower, or (2) to sue for any money or property due under the agreement. And if her consent to the terms of the agreement can be shown to have been extorted by force or fraud, the Court may refuse to enforce it against her without, on that account, annulling the divorce. Effect of failure of consideration.

* The latter would, strictly speaking, have been irrelevant in this form of action even if proved, though it might have been a good defence to an action on the husband's part for restitution of conjugal rights. See s. 77, *post.*

Buzul ul Raheem v. *Luteefut-oon-nissa*, 8 Moo. I. A., 378 (1861). In this case the execution of the agreement was found to have been brought about by the grossest coercion and intimidation; but probably the decision would now be the same on proof of any of the other four grounds enumerated in s. 14 of the Contract Act, 1872, as negativing freedom of consent; namely, undue influence, fraud, misrepresentation, or mistake.

Khula or Mubaraat without explicit mention of the rights released.

71. The Hanafi authorities are divided as to the effect of a divorce pronounced at the request of the wife with the use of the word *khula*, or by mutual agreement as expressed by the word *mubaraat*, without any further specification of the rights to be released. It is submitted that on the balance of authority the use of either term involves the release by the wife of her dower, leaving him still liable for her maintenance during *iddat*, and for the maintenance of his children by her, including wages for suckling if required.

Baillie, pp. 304 and 305 *n.*; Hed. 116. The Fatawa Alamgiri, as rendered by Baillie, first states that "*Khoola* and *Moobarat* cause every right to fall or cease which either party has against the other depending on marriage," and then that "when a *khoola* is made by means of the word *khoola*, it does not occasion the release of any other debts than dower," and that "in like manner, with regard to the word *moobarat*, though there is a difference of opinion, the correct view is that it does not occasion the release of other debts than dower." "So also with regard to the words sale and purchase; * though there is the like difference of opinion, the most correct is that, like *khoola* and *moobarat*, they do not occasion a release of other debts than dower. Neither these words nor repudiation for property † occasion a release of maintenance during *iddat*, without a condition to that effect, according to all opinions. Nor do they effect a release from the maintenance of a child, or the hire of suckling it, without a special condition." In order to reconcile the first sentence with what follows, we must assume that dower was the only "debt" (as distinguished from non-pecuniary obligations) which the writer considered to be dependent upon the (continuance of the) marriage. A footnote on p. 305 quotes the Inayah to the effect that "maintenance during *iddat* is to be distinguished from any past maintenance that may be due to her, which seems to fall as a right dependent upon marriage." Both are of course equally *consequences* of the marriage, and so is the husband's obligation to maintain every child born of the marriage, and to pay the ex-wife or somebody else for suckling an unweaned child; but they arise immediately from the paternal rather than from the conjugal relation. They are not part of the consideration for the wife's conjugal duties. The Hedaya gives the above as the doctrine of Abu Hanifa, and from giving him the last word may be supposed to agree with him, but mentions that Muhammad held nothing to be released except what was specified in the contract, while Abu Yusuf is said to agree with Muhammad as to the *khula*, but with Abu Hanifa as to *mubaraat*, drawing just the opposite distinction

* Meaning, I suppose, that the husband says to the wife, "I have sold to you my conjugal rights"; on that the wife says to the husband, "I have purchased from you my liberty."

† *I.e.* a divorce in the *talák* form, but with some mention of money or money's worth passing in consideration thereof.

to what one would have expected, seeing that the husband has surely more reason to expect compensation for granting *khula* at the sole desire of the wife than where the separation takes place as much by his wish as by hers. But he took his stand simply on the grammatical form of the two terms, the one implying reciprocity, the other not.

Judicial Divorce.

Three grounds of judicial divorce.

72. A Muhammadan marriage, originally valid, may be dissolved by judicial decree in British India on the following grounds only :—

1. Option of puberty, already discussed (s. 18 (*b*), *ante*).
2. Impotence of the husband [and, *perhaps*, renunciation of his conjugal rights expressed in a peculiar form]. See s. 73.
3. (*Perhaps*) an imputation of adultery made by the husband against the wife. See s. 76.

As to the judicial separation of parties united by an invalid (*fasid*) marriage, see s. 39A, *ante*

Impotence of husband.

73. A wife may claim a judicial divorce on the ground of her husband's impotence, proved to have existed at the time of the marriage, provided that she did not then know of it, and that it has not since been removed, but not if she knew of its existence at the time of the marriage, nor if it only commenced after the marriage had been both contracted and consummated. The divorce must remain suspended for a year after decree, in order that it may be ascertained whether the defect is removable.

Baillie, Book III, chap. xi, especially p. 348. The rules of evidence, to which a large part of that chapter is devoted, appear to be superseded by the Indian Evidence Act. See also Hed. IV, xi.

In *Vadaka Vitil Ismal*, 3 Mad., 347 (1881), and also in *A.* v. *B.*, 21 Bom., 77 (1896), a divorce was sought on this ground, but in each case the fact was held not to be proved.

[It seems to be Hanafi law, though it has been criticised as logically inconsistent with the above provision, that voluntary abstention from sexual intercourse on the part of a husband who is not impotent, after the marriage has once been consummated, does *not*, however prolonged, entitle the wife to claim a divorce, or afford ground for judicial intervention.]

Of wife.

74. In the converse case of a bodily defect in the wife, the husband is simply left to his ordinary power of divorce which he can exercise without judicial assistance and

without assigning that or any other reason ; the wife's right to dower remains unaffected.

Baillie, 348 ; Hedaya, 128, and note. If, however, the bad state of the bride's health is concealed from the bridegroom at the time of the marriage, it comes under the general rule laid down by Ameer Ali, M. L., vol. ii, p. 326, on the authority of the *Radd ul Muhtar*, that " where consent to a marriage has been obtained by force, *or fraud*, it is invalid unless ratified after the coercion has ceased, or the duress has been removed, or the consenting party, being undeceived, has continued the assent." And it was accordingly held, in *Abdul Latif Khan*, 31 All., 343 (1909), that the heirs of a woman who was married on the faith of a representation that she was in sound health when, in fact, she was seriously ill, and who died of that illness before consummation, had no right to any part of the stipulated dower.

74A. If one of two married persons, not Muslim, embraces Islam, Islam is to be presented to the other ; if he accepts, the marriage is not affected ; if not, it is a ground for divorce.

Baillie, 1875, p. 180. Islam being an act of piety, is not a ground for separation, but the obdurate rejection of it is : *Hedaya*, vol. i, p. 178. The exception is when the husband is a convert and the wife a Kitabiya, because a marriage between a Muslim man and a Kitabiya woman is lawful ; see s. 39 *n.* 2.

The principle came up for decision in an unreported case before the Munsif of Bilaspur, C. P., in 1918. A Hindu married woman became a Muslim, and a declaratory suit was instituted on her behalf against the Hindu husband praying that he should either embrace Islam and live with her, or that the marriage might be declared dissolved. The husband was served, but did not appear, and a decree was granted *ex parte*. Assuming that the husband did not embrace Islam, what was the effect ? The husband's conduct was equivalent neither to accepting nor rejecting Islam. In such a case Muhammadan Law requires the judge to repeat the invitation thrice, after which the marriage might be dissolved. (See Baillie, as above). It is doubtful whether an Anglo-Indian Court would make this invitation in express terms, but perhaps three *ex parte* decrees or one such decree, with two attempts at execution without result would entitle the plaintiff to divorce. If defendant appears at the first citation and refuses to follow plaintiff's religion, it would be a ground of divorce. This result might not, perhaps, appear unreasonable in view of the fact that in the converse case, where either or even both of the parties to a Muhammadan religion renounce that religion, the marriage is *ipso facto* dissolved. (See s. 78A. below). In *Ram Kumari's* case, 18 Cal., 264 (1891), the judges suggested that the converted woman might have instituted a suit after due notice to the husband for a declaratory decree that under Muhammadan Law her former marriage was dissolved. Such a suit would apparently lie, and the language used by the judges implies that the Court would accept due notice [or invitation to Islam] by the wife in lieu of the invitation which a purely Muhammadan kazi would make to the husband, but which an Anglo-Indian Court might consider itself precluded from making, on account of its neutrality in matters of religion.

Zihar.

75. The use, on the part of the husband towards his wife, of certain expressions implying that he would no more think of having sexual intercourse with her than with his

mother, or any other prohibited relative, gives her the right, by pure Muhammadan Law—

(*a*) To refuse herself to him until he has performed the penance prescribed by law for such cases, and

(*b*) To apply to the Court for an order requiring him either to perform the penance or to give her a regular divorce, such as will entitle her to deferred dower and enable her to re-marry.

It is uncertain whether a Civil Court in British India would either recognise the former plea as a valid defence to a suit for restitution of conjugal rights, or pass a decree in accordance with the latter alternative.

Baillie, Book III, chap. ix, "Of Zihar;" Hed. IV, 117 and 602. The original source of the curious rules respecting *Zihar* is the Koran, xxxiii, 3, and lviii, 1–4.* Professor Palmer's note on the former passage is: "The Arabs were in the habit of divorcing their wives on certain occasions with the words, 'Thy back is to me as my mother's back;' after which they considered it as unnatural to approach them as though they were their real mothers. This practice Muhammad here forbids." The latter passage, confessedly elicited by a case that had actually occurred, and in which the aggrieved wife had appealed to the Prophet, repeats the admonition that such declarations are false and unjustifiable; but instead of going on, as one might expect, to pronounce them mere nullities, God is represented as merely mitigating their effect by permitting the husband to renew cohabitation after performing certain expiations. The Hedaya tells us (p. 117) that, "In times of ignorance (*i.e.* before the establishment of the Mussulman faith) Zihar stood as a divorce; and the law afterwards preserved its nature (which is prohibition), but altered its effect to a temporary prohibition, which holds until the performance of expiation, but without dissolving the marriage."

The notion of the expressions in question being insulting to the wife, and therefore requiring expiation, receives no support from the Koran, nor from the Hedaya; and it has been well shown by Professor Robertson Smith that the original idea was totally different, *viz.* that the woman so addressed was thereby *promoted* from the subordinate status of a wife to the highly honourable position of an adoptive mother (Early Arabia, p. 289). This view is strongly confirmed by the fact that the Fath ul Qarib, one of the chief Shafeite authorities, allows the effect of inchoate divorce only where the comparison is to the back, not to any other part of the body of the mother (or other prohibited female). This would naturally imply the most absolute unsuitability for carnal intercourse, though another, hardly intelligible, explanation is offered by the author. See F.Q. p. 501.

The doubt whether it would be possible for an Anglo-Indian Civil Court to give effect to these rules arises from the nature of the prescribed expiation, which is (1) primarily to emancipate a slave; if that be impossible (as, of course, it is in British India), (2) to fast from dawn to sunset for two months; or if that be impossible, then (3) to feed sixty poor persons for one day.

* Set out in Appendix D.

Whatever order a Civil Court may make on behalf of the wife must be defeasible on proof that the husband has performed the proper penance; and by what evidence is the judge to satisfy himself either that the fasting has been *bonâ fide*, or that it is so impossible as to let in the last (and for a rich man the easiest) alternative? Compare Mayne's Hindu Law, ss. 548 and 553, on somewhat analogous cases under that system. He appears to think that a judge could hardly be called upon to decide such questions, but he admits that the Courts have in some instances dismissed claims to inheritance on the ground of disabilities which might have been, but in fact had not been, removed by penance.

Tornauw, Das Moslemische Recht, p. 173, states that he has himself met with such cases, though rarely, in Trans-Caucasian Russia, and that they are there dealt with by the Muhammadan kazi, not by the Russian district judge. [N.B.—The Shia Law is the prevalent form in that province.]

"Li'an" or imprecation.

76. The fact of a husband having (whether truly or falsely) charged his wife with adultery, will (probably) entitle her to claim a judicial divorce, without prejudice to any proceedings for defamation which she may be advised to institute, and independently of the result of any such proceedings.

The above appears to be the net result of the Muhammadan rules respecting *li'an*, after striking out all that properly belongs to the Law of Evidence on the one hand or to the Criminal Law on the other. For the pure Muhammadan Law, see Baillie, 333–334; Hed. 123–126; Macn. Princ. vii, 29. Where that law is enforced in its entirety, a man who has imputed infidelity to his wife, without being able to bring four law-worthy eye-witnesses to the very fact, may be called upon either to withdraw the imputation, in which case he incurs the Koranic punishment for slander, *viz.* 80 stripes, or to confirm it by oath, in which case she must be called upon either to admit the truth of the imputation, or to deny it on oath. By admitting her guilt she renders herself liable to capital punishment; on her denying it, and setting her oath against that of her husband, it becomes the duty of the kazi to believe her, and to pronounce a judicial divorce, unless the husband divorce her on his own account.

As to the effect of *li'an* on the issue, see the next Chapter. Inasmuch as the modern law of British India provides no punishment for conjugal infidelity on either side, and does not admit of Muhammadans being examined on oath,* it may seem at first sight that the whole law of *li'an* must be considered obsolete; but, on the other hand, if we take the essential principle of the institution to be, that an unretracted accusation of this kind renders proper conjugal affection impossible, it appears to be a principle which our Courts may very reasonably enforce, as a useful counterpoise to the liberty of divorce allowed to the husband. That a husband should not be able to retain against her will a wife who is really guilty of adultery, cannot be regarded as in itself a hardship. That she should escape punishment altogether, not even forfeiting the deferred dower, and should be in precisely the same position as if he had divorced her out of mere caprice, is no doubt a reproach to Anglo-Muhammadan Law as a whole, but not to this particular portion of it; the blame rests partly with the Muhammadan legislators for failing to afford better legal security to a well-conducted wife, partly with the Anglo-Indian Legislature, in that it has abolished the Muhammadan punishments for adultery without putting anything in their place.

* See the Oaths Act, X of 1873; the exceptions therein mentioned will hardly apply here.

It is true that it was held in *Jaun* v. *Beparee*, 3 W. R., 93 (1865), that a charge of adultery by a Muhammadan against his wife "does not operate as a divorce," but this is by no means equivalent to a decision that the Court might not decree a divorce on that ground, at the instance of the wife, and the further suggestion that it could have no effect except "as an item of ill-usage towards making up an answer to a claim for conjugal rights" was merely *obiter dictum*. The question is therefore still an open one, even for the Calcutta High Court.

In Ameer Ali's Muhammadan Law, vol. II, p. 463, several cases are mentioned in which the procedure by *li'an* was enforced by the Algerian kazis, and it is recognised in the Egyptian Code of Hanafi law, Articles 334–339.

77. Neither cruelty nor conjugal infidelity on the husband's part, nor neglect or inability to afford proper maintenance to his wife, will entitle her to claim a judicial divorce.[1] On the other hand, either of these grounds, or even simple incompatibility, places in her hands the initiative for seeking *Khula* (s. 69). But "actual violence of such a character as to endanger personal health and safety, or reasonable apprehension of such violence" will justify the wife in leaving her husband, and afford an answer to a suit for restitution of conjugal rights; and some other kinds of misconduct, not involving actual or threatened violence, will probably have the same effect.[2]

Cruelty not a ground for divorce, but a defence to a suit for restitution.

Though released from the duty of cohabitation, she will still remain his wife, and as such unable to take another husband, or to claim her deferred dower (if any), unless and until he chooses to divorce her.

On the other hand, the husband, so long as he persists in refusing to divorce the wife whom he cannot compel to live with him, is subject to the following inconveniences :—

Consequence of separation without divorce.

(1) He may be ordered to pay a monthly sum for her maintenance, unless he can prove that she is living in adultery.[3]

(2) If he happens to have three other wives besides the separated one, he is disabled from taking another.

(3) Her claim for the unpaid portion (if any) of her dower remains outstanding, though not immediately enforceable, which claim she may perhaps be willing to release as the consideration for a *Khula* divorce.[4]

(4) She retains, so long as she is undivorced, her prospective share of his inheritance, thereby placing some additional restraint on his power of testamentary disposition. On the other hand, he retains his chance of inheriting a share of her property, supposing her to have any.[5]

[1] As to non-maintenance, see Baillie, p. 443 : " A man is not to be separated from his wife for inability to maintain her. But the judge may direct her to raise her maintenance by borrowing on his credit." Seeing that *ex hypothesi* he has no credit, the meaning probably is that she is to provide herself with necessaries out of her own resources if she has any, or at the expense of those relatives who are legally compellable to maintain her, and that she and they are authorised to treat the sums so expended as a debt recoverable from the husband, should his circumstances improve. This course being not always practicable, and the Shafeite law permitting judicial divorce in such cases, certain Hanafi authorities quoted by Ameer Ali, M. L. vol. II, p. 364, recommend that the Hanafi kazi should depute a Shafeite kazi to try the case. And the learned author assures us that this course is actually followed by the Arabs under French rule in Algeria ; and he seems to think that it would be permissible in India (*sed qu.*).

As to judicial divorce for the husband's cruelty or adultery, the Hedaya and Fatawa Alamgiri are silent, unless, indeed, we are to understand in a compulsory sense an isolated expression in an extract from the latter work, which is thus rendered by Baillie, p. 304 : " When married parties disagree, and are apprehensive that they cannot observe the bounds prescribed by Almighty God (or, in other words, perform the duties incumbent on them by the marriage relation), there is no objection to the woman's ransoming herself from her husband, with property, *in consideration of which he is to give her a khoola.*" If this means that the kazi must, or may, on the wife's demand, compel the husband to give her a *khula*, we must further suppose (1) that he can pass such a decree on mere proof of incurable disagreement, or incompatibility, irrespective of actual cruelty or other breach of conjugal duty ; and (2) that he can fix at his discretion the price at which the woman is to purchase her freedom. These propositions, if accepted, would to a certain degree assimilate the woman's position as regards divorce to that of the man, but the point has never come up for judicial decision in British India. Though the English words italicised are ambiguous, a reference to the original shows that the writer did not mean to say that the husband *must* give the *khula*. More literally translated, the last part of the sentence will read : " it is not amiss that if she ransom herself with property he should give her a *khula* for it " The Hedaya (p. 412) makes it still more clear that it is a matter of " offering such compensation as may induce him to liberate her."

On the other hand, the *hadith* in Tirmizi (I ,368) that a woman who demands *khula* without necessity will lose heaven, implies that legally she can make good her demand, possibly without other reason than alleged " aversion " or its modern equivalent " incompatibility," but at least when she can satisfactorily show to impartial parties the impossibility of a happy married state. There is no decision of an Anglo-Indian Court to show whether it would or would not decree *khula* on good cause shown by the wife, against the husband's wishes, but the authorities on pure Muhammadan law make it probable that it would use its discretion. In any case a family conciliation council, in which both families are represented (see p. 55, *ante*), would, if conciliation failed, be

able to put sufficient pressure on him to procure a *khulâ* if sufficient reasons existed.

In *Vadaka Vitil Ismal* (noticed under s. 69), though the High Court adverted incidentally to the fact that *khula* (like *talák*) is valid though granted under compulsion, and this remark happened to get into the reporter's head-note, so far from implying that any Court would have been justified in applying judicial compulsion, it laid particular stress on the fact that the husband assented, of his own free will, to the compromise suggested by the District Judge.

Clavel, Droit Musulman, i, pp. 230–236, asserts positively that according to Hanafi Law divorce can be judicially pronounced for various breaches of marital obligation, among which are wilful neglect to provide proper maintenance for the wife, and the use of personal violence under whatever provocation. He considers this to be indirectly implied in certain articles of the Egyptian Code, on which his work is a commentary, which appear to be statements to the contrary. He cites no other Muhammadan authority, but he refers to numerous decisions of the Algerian Courts in a way implying that the parties were of the Hanafi persuasion.

[2] *Buzloor Ruheem*, 11 Moo. I. A., 551 (1867).* The words "there must be actual violence, etc.," were quoted by the Privy Council (p. 611) from the judgment of Lord Stowell in the English case of *Evans* v. *Evans*, 1 Haggard, Consist. i (1790), and were applied to the case before their Lordships with the remark that "the Muhammadan Law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own." Further on (p. 615) it seems to them "clear that, if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband in the performance of the obligations which the marriage-contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for refusing to him the assistance of the Court, and there may be cases in which the Court would qualify its interference by imposing terms on the husband."

But since Lord Stowell's time it has been made clear in England that a course of unkind treatment may be cruelty in the legal sense, though keeping clear of actual violence, if it tends to endanger the wife's health or to produce insanity (*Kelly* v. *Kelly*, L. R., 2 P. D., 59 (1870), followed by the Allahabad High Court in the Hindu case of *Rukmin* v. *Peare Lal*, 11 All., 480 (1889). And moreover, in the Privy Council case above cited, their Lordships threw out (at p. 612) the suggestion that even apart from legal cruelty a Muhammadan wife might have rights against her husband which an English wife has not (or had not), and that an Indian Court might well admit defences to a restitution suit founded on those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety and her other legal rights; or it might, on a sufficient case, select a proper place of residence for the wife, other than her husband's house. This suggestion was acted on in *Husaini Begam*, 29 All., 222 (1906). There it appeared that the husband, who was suing for restitution of conjugal rights, had made an unfounded charge of adultery against the wife, and also that there were reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's house, which was situated in

* Names and dates strongly suggest, what is, however, not stated in the reports, that this Buzloor Ruheem is the same person as the appellant in *Buzul ul Ruheem* v. *Luteefu-toonnissa* (p. 169), who thus managed to contribute two leading decisions to Anglo-Muhammadan Law by straining his marital rights against two rival wives in succession, and giving the second good cause to repent of her complicity in his ill-treatment of the first.

a native State. The Court thereupon dismissed the husband's suit upon the wife undertaking to live with him at Moradabad, the place within British territory where she was then residing in a house of her own.

[3] S. 488 of the Code of Criminal Procedure, 1898, already noticed.

[4] See above, s. 46.

[5] As to the effects of divorce, see s. 78.

Husband not liable for wife's costs.

77A. The English rule, that the husband in divorce proceedings is liable *primâ facie* to the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Muhammadans, though it does apparently form part of the general law of British India.

So decided by the Bombay High Court, in *A.* v. *B.*, 21 Bom., 77 (1896).

The same Court had previously, in *Mayhew* v. *Mayhew*, 19 Bom., 293 (1894), a divorce suit between Eurasians domiciled in British India, instituted by the husband against his wife, ordered the husband to pay the wife's costs already incurred, and to give security for her future costs. Farran, J., stated the reason for the continuance of the rule ("whatever may have been its origin") to be "that it is not considered just, either that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours if he takes up a case which he honestly believes to be genuine, but which may after all turn out to be unfounded. It is a rule of public policy." The learned judge did not explain why the same public policy should not be invoked in favour of any other litigant "without the means of putting his case fairly before the Court" or in favour of any other practitioner disappointed in his hope of getting costs out of the other side. The original reason, to which he alludes, but on which he declines to lay stress, was no doubt that, under the old English Common Law, the very marriage which it was the object of the suit to annul or dissolve was the cause of the husband acquiring all his wife's personal property, and thus rendering her defenceless against him. This ground for the rule has been cut away as regards the general law of India by s. 4 of the Succession Act, 1865. The Calcutta High Court had in 1879 felt itself at liberty to refuse costs to the wife, notwithstanding s. 7 of the Indian Divorce Act, 1869, which enjoins conformity to the English practice for the time being (*Proby* v. *Proby*, 5 Cal., 357); but the Bombay judge declined to follow that ruling because he observed that since then the English Law had been assimilated to the Indian by the Married Women's Property Act, 1882, and yet the practice of the English Divorce Court as to the wife's costs remained the same as before.

In *A.* v. *B.* the parties were Muhammadans, and therefore the Indian Divorce Act had no application. But it was contended for the wife, in accordance with the view expressed in *Mayhew* v. *Mayhew*, that the English rule was based on a broad ground of public policy applicable to Muhammadans as well as to others. The Court, however, declined to accept that view, considered that the English rule could only be justified by the peculiar position of the wife under the old Common Law, to which there was nothing corresponding in Muhammadan Law, and accordingly decided against the wife.

Effect of Divorce.

78. The consequences indicated in the first five sub-clauses of this section follow from the completion of a valid (*báin*) divorce by any of the above-mentioned methods.

(1) Sexual intercourse between the divorced persons becomes unlawful,[1] and can only be re-legalized by a regular marriage. Cohabitation unlawful.

(2) The wife is free to marry another husband after the completion of her *iddat* (s. 31) ; or immediately if the marriage was never consummated.[2] When wife may re-marry.

(3) The husband may complete his legal number of four wives without counting the divorced one, or may marry a woman who could not be lawfully joined with the divorced one (*e.g.* her sister), after the completion of her *iddat*, but not before.[3] Husband may make up his number, etc.

(4) If the marriage had been consummated before the divorce, the whole of the unpaid dower, whether prompt or deferred, becomes immediately payable by the husband to the wife, and is enforceable like any other debt. Dower.

If the marriage had not been consummated, and the amount of dower was specified in the contract, he is liable for half that amount ; if none was specified, he must give the divorced wife a present (*mut'at*), consisting of three articles of dress suitable to her rank, or their value. But the wife has no right to anything if the divorce before consummation took place by her wish, or. in consequence of any disqualification on her side—*e.g.* her apostasy.[4]

(5) The wife loses in general, her right of inheritance from the time when the divorce becomes irreversible ; but she is entitled to be maintained by her husband during the *iddat* on the same scale as before the divorce, conditionally on submitting to her husband's control as regards her place of residence and general behaviour.[5] And she also retains her right of inheritance in the Maintenance during *iddat*, and right of inheritance in case of deathbed divorce.

event of her husband dying during that interval, if the divorce was pronounced (otherwise than at her request, or under the extreme provocation of her incest with his son) while he was expecting to die.[6] But on completion of the *iddat* she ceases to have any claim for maintenance either under Muhammadan Law or under the Code of Criminal Procedure, and the right of inheritance also lapses as from that date, if not before.[7]

Restraint on re-marriage of divorcees.

(6) If the divorce took the form of a triple pronouncement the divorced couple may not re-marry, unless and until the woman has been married to another man, and divorced by him *after consummation*. No presumption as to the fulfilment of this condition can be drawn from the mere fact of re-marriage.[8]

If, on the other hand, the divorce, though "*bâin*," was not in the triple form, there is no legal obstacle to re-marriage in the ordinary way.[9]

Explanation.—With reference to clause (4) but not with reference to clause (6), what is called "valid retirement" (s. 36) has the same legal effect as actual consummation.[10]

[1] Baillie, 292. According to some of the jurists there cited, the wife would be even justified in killing her *ci-devant* husband, if she could not otherwise prevent him from exercising his forfeited conjugal rights.

[2] Baillie, 350, 351; Hed. 128.

[3] Baillie, 34; Hed. 32.

[4] Baillie, 96, 97; Hed. 44, 45. The primary authority for the *mut'at* is the Koran, ii, 236–237, for which see Appendix D.

[5] Baillie, 450; see also p. 358; Hed. 145; Macn. p. 297, case 44 in chap. vi. of the Precedents. For the Shafei Law, see under s. 402.

[6] Baillie, 277; *Sarabai*, 30 Bom., 537 (1905). The reason for the exception is that a divorce pronounced on a death-bed is not likely to have any better motive than a desire to cheat the wife out of her fairly earned share of the inheritance, and to benefit one heir at the expense of another, a thing to which the Muhammadan Law is strongly opposed.

[7] As to the Muhammadan Law, Baillie, as above; as to maintenance orders under the Code of Criminal Procedure, *Abdur Rohoman* v. *Sakhina*, 5 Cal. 558 (1879); *Abdul Ali Ismailji*, 7 Bom., 180 (1883). In the Allahabad High Court there were conflicting decisions on the point, but in *Shah Abu Ilyas*, 19 All., 50 (1896), it was held by two judges to one of the Full Bench, in accordance with the rulings of all the other High Courts, and of the Chief

Court of the Panjab, that a maintenance order drops *ipso facto* when the wife has been divorced and the *iddat* has expired.

[8] Baillie, 290; Hed. 108; *Akhtaroonissa* v. *Shariatoollah*, 7 W. R., 268 (1867). This provision is found in the Koran; see K. ii, 230, in Appendix D.—The object was doubtless, as stated by Ameer Ali, ii, 324, "to arrest the scandal of indefinitely repeated divorces and re-marriages, which had become frequent in Arab society, and were opposed to the interests of public morality." Taken in connection with the law which rendered (and in Muhammadan countries still renders) both husband and wife liable to very severe punishment if they come together after a complete divorce without satisfying this repulsive condition, it must have been about as powerful a check on marital caprice as could have been devised without limiting the power of divorce itself or making it absolutely irreversible. But it may lead in practice to certain abuses (see Muir's "Life of Mahomet," p. 326 and note), which the Egyptian Code * provides against, but which have not been heard of in India, and have certainly not come under the notice of Anglo-Indian Courts.

[9] Baillie, as above, and Hed. 107. In both these passages it is said that *he* may re-marry her either during the *iddat*, or after its completion; though she could not lawfully marry any other man until it had expired, because the danger of confusion of paternity, which was the reason for the general prohibition, does not apply in this case.

[10] Baillie, 96, 98, 101, 290.

As to the effect of divorce as regards the children of the marriage, see s. 107 (1) and s. 108 (2).

78A. It seems that the effect of either or both of the parties to a Muhammadan marriage renouncing the Muhammadan religion is to dissolve the marriage *ipso facto*, so far as the British Courts are concerned, leaving it open to the parties to solemnise a fresh marriage under the Christian Marriage Act, XV of 1872, or under Act III of 1872, according to circumstances.

Automatic divorce by apostasy.

Zuberdust Khan, 2 N. W., 370 (1870). There both spouses had become converted to Christianity, without re-marrying as Christians, and the husband afterwards sought a divorce under the Indian Divorce Act, 1869, on the ground of his wife's adultery. In refusing this relief, on the ground of the Act being applicable only to monogamous marriages, the Court intimated that a suit for restitution of conjugal rights would equally have been dismissed for want of mutuality, the woman having lost her status as a Muhammadan wife through her apostasy. See Hed. 66; Baillie, 182. This case was followed by the Allahabad High Court in *Amin Beg* v. *Saman*, 33 All.,90 (1910), notwithstanding that the attention of the Court was called to an expression of opinion to the contrary in the third edition of Ameer Ali's "Mahomedan Law," vol. II, p. 432.

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* The Egyptian Code (Art. 248) requires that the consummation of the second marriage should have been not only *actual* but also in *good fatih* (*réelle et sans fraude*), and this view is supported by an opinion attributed to Abu Yusuf in the Hedaya; but the opinion of the compiler is distinctly that the legalising device is effectual, though "abominable," and was held by Muhammad; and the Fatawa Alamgiri (Baillie, 292) is equally explicit in the same sense, even permitting the women to contract the second marriage under a condition giving her power to divorce herself whenever she pleases.

The Court relied also on a decision of the Panjab Chief Court, Panj. Rec. 309 (1906), *Imamdin* v. *Hasan Bibi.*

The Christian Marriage Act applies if either of the parties is a Christian. Act III of 1872 can only be resorted to when neither party professes any of the great historic religions.

CHAPTER IV.

PARENTAGE.

Among savage peoples the phenomenon everywhere confronts us of wedded life without a grain of love. Love, then, is no necessary ingredient of the sex relation; it is not an outgrowth of passion. Love is love, and has always been love, and has never been anything lower. Whence, then, came it? If neither the husband nor the wife bestowed this gift upon the world, what did? It was a little child."—*Drummond's* "*Ascent of Man*," p. 391.

"Ye know not whether your parents or your children be of greater use to you."—*Koran*, chap. iv, v. 11.

79. Paternity is the legal relation between father and child. Maternity is the legal relation between mother and child. Definitions.

The rights and duties depending on these legal relations are—

(*a*) The rights and duties of Guardianship, as to which see the next Chapter.

(*b*) The duty to maintain children, and the right to be maintained by them, under the circumstances described in Chapter V.

(*c*) The mutual rights of inheritance described in Chap. VIII.

80. Paternity is established in the person said to be the father by proof or legal presumption that the child was begotten by him on a woman who was at the time of conception his lawful wife,[1] or was in good faith and reasonably believed by him to be such,[2] or whose marriage, being merely irregular (*fasid*), and not void *ab initio* (*bátil*), had not at that time been terminated by actual separation;[3] and in no other way.[4] Adoption is not recognised as a mode of establishing paternity.[5] Paternity—how established.

[1] The definition of marriage as "a contract for the purpose of legalising generation" (*ante*, s. 17) implies the legal paternity of the man who has begotten a child in lawful wedlock.

[2] See Baillie, Book V, ss. 4 and 5, for examples of such *bonâ fide*, though erroneous, belief. In some of the examples given the mistake is not of fact, but of law; though, on the other hand, there are some rules of law, *e.g.* the table of prohibited degrees, which are supposed to be so notorious that no profession of ignorance will be listened to.

[3] For the difference between these two kinds of invalidity, see s. 39A, *ante*; and for the rule that the "paternal descent of a child born of an invalid marriage is established in the husband," Baillie, 157.

[4] By pure Muhammadan Law the master of a slave concubine may legitimate a son born to him from her by express or implied acknowledgment; and any child subsequently born to him from the same woman is *ipso facto* legitimated in default of express repudiation. Baillie, 377; Macn. Princ, vii, 32, p. 61 But even in Macnaghten's time (1825) the Maulvis of Bengal, in answering a question respecting the child of a woman described as a slave girl, refused to admit that she could be really such, remarking that "in legal strictness slavery has been almost extinct in this country for a series of generations." By this they probably meant that capture in *a holy war against infidels* was, according to the Koran, the only legitimate source of slavery, and that no such war had occurred within living memory. It is quite clear that at the present day no right based on slave-owning can be recognised in British India, though the term "slave girl" is sometimes used loosely for "concubine" in law reports of quite modern date.

[5] Koran, xxxiii, 4–5, Palmer's translation.

[4] "God hath not made for any man two hearts in his inside; nor has he made your wives—whom you back away from—your real mothers, nor has he made your adopted sons your real sons. That is what ye speak with your mouths, but God speaks the truth, and He guides to the path. [5] Call them by their fathers' names; that is more just in God's sight; but if ye know not their fathers, then they are your brothers in religion and your clients."

Adoption was common among the pre-Islamite Arabs in at least three different forms. Sometimes an Arab would employ it to legitimate his own son by a slave-girl; sometimes a refugee from another tribe was adopted by a member of the tribe which received him; and sometimes a youth of Arab race enslaved to another by the fortune of war, would gain his attachment to such an extent as not merely to be set free but to be treated by him as his son, which is what occurred as between the Prophet and Zaid. The fiction of sonship seemed a bar when the Prophet wished to marry Zaid's divorced wife, marriage with a son's former wife having been already prohibited (K. iv, 23; *ante*, s. 36 (4)); and the personal occasion of the revelation above quoted, which declares in effect that the fiction is to have no practical consequences, is placed beyond a doubt by the 37th to the 40th verse of the 33rd chapter.

"But when Zaid had determined the matter concerning her, we joined her in marriage unto thee; lest a crime should be charged on the true believers in marrying the wives of their adopted sons, when they have determined the matter concerning them, and the command of God is to be performed. No crime is to be charged on the Prophet, as to what God hath allowed him, conformable to the ordinance of God with regard to those who preceded him (for the command of God is a determinate decree), who brought the messages of God, and feared Him, and feared none besides God; and God is a sufficient accountant. Muhammad is not the father of any man among you, but the apostle of God, and the seal of the prophets; and God knoweth all things."

The famous Patna case * shows how this elementary principle was ignored in the very early days of British rule; but it was clearly laid down by the Muhammadan law officers in a case recorded by Sir W. Macnaghten (Precedents, chap. i, case 6) that, "during the lifetime or after the death of the adopted father, the adopted son has no claim upon his property," and in a recent

* Described at length, from this special point of view, in Sir R. K. Wilson's Introduction to the Study of Anglo-Muhammadan Law, Chap. V; and from two other very different points of view, in Macaulay's Essay on Warren Hastings, and Stephen's Nuncomar and Impey.

Allahabad case, Mahmood, J., remarked generally that "there is nothing in the Muhammadan Law similar to adoption as recognised by the Roman and Hindu systems;" *Muhammad Allahdad Khan*, 10 All., 289 (1888). So, too, in the case of *Jeswunt Singhjee*, 3 Moo. I. A., 245 (1844), at page 258, a deed by a Muhammadan, in which he declared, "I have adopted A.B. to succeed to my property," was held to be neither a deed of gift, there being a complete absence of any relinquishment by the donor, or of seisin by the donee, nor a testamentary disposition, the expressions used being altogether unsuitable to a will, and in short to be from every point of view a mere nullity. See, however, Act I of 1869, s. 29, permitting Muhammadan Talukdars in Oudh to adopt as if they were Hindus.

In *Bai Machhbai*, 35 Bom., 264 (1911), it appeared that the Parmar Rajputs of Dhanduka, otherwise called Girasias, had, like the Khojas and Memons (p. 33, *ante*), on their conversion to Muhammadanism some 400 years ago, retained their Hindu usages of inheritance and succession. It might naturally be supposed that this would carry with it the Hindu custom of adoption, but the Bombay High Court held that adoption was not necessarily "inheritance or succession" and that, as the Muhammadan Law does not recognise adoption, the burden of proof lay on those who asserted that this custom also had been retained.

Not only is adoption not recognised by general Muhammadan law, but even if made in fact by a Muhammadan, it carries with it no right of inheritance: *Umar Khan*, L. R., 39 I. A., 19 (1911), at p. 25. This was a Panjab case, in which the Privy Council held the issue of adoption to be an immaterial issue, and the existence of a special family or tribal custom unproved. If it *had* been proved that the family was subject to a custom by which adoptive sons *had* rights of inheritance, s. 5 of the Punjab Laws Act, IV of 1872, must have given priority to custom over general Muhammadan Law in the Panjab. And a similar result would follow in other Provinces where custom is given priority by legislation (*e.g.* Oudh): see ss. 2–8 of this Digest.

81. The three presumptions undermentioned are laid down in Muhammadan lawbooks, but it is uncertain to what extent, if at all, a judge administering Anglo-Muhammadan Law is bound to take notice of them.

Presumptions as to lawful paternity:

(*a*) It is conclusively presumed that a child born within less than six months after the marriage of the mother cannot have been begotten by her husband in lawful wedlock.*

Against, from birth within six months after marriage.

(*b*) If a child is born from a woman during the subsistence of a lawful marriage, and more than six months after its commencement, the burden of proving that it was not lawfully begotten by her husband is on the person who asserts it.

For, from birth after six months.

(*c*) If the birth took place after, but within two years of, the termination of the marriage by death or divorce, the presumption is still in favour of conception in lawful marriage, but it may be rebutted by proof that the mother

For, within two years after termination of marriage.

* Had this been the English rule, Thackeray's Esmond would have been illegitimate, and the whole plot of the novel would have had to be recast.

had announced the completion of her *iddat* at least six months before the birth of the child, or by proof that the mother confessed to having in the mean time had sexual connection with some other man.

Baillie, 393, from the Sharifiyah, a treatise on Inheritance : " The shortest period of gestation in the human species is six months, as already observed, and the longest is two years, according to Aboo Huneefa, who assigned this as the maximum on the authority of Ayeshah, who is reported to have said, as having received it from the Prophet himself, that a child remains no longer than two years in the womb of its mother, even so much as the turn of a wheel."* Then follow, as extracted from a portion of the Fatawa Alamgiri purporting to treat of Divorce, rules substantially identical with (*a*), (*b*), (*c*) above stated. Thus both the rules themselves, and the supposed physical law on which they apparently depend, are treated by Arabian lawyers as belonging to Family Law rather than to the Law of Evidence. Nevertheless, the reason is so essentially a matter of legal presumption as to afford some ground for the contention that the rules are outside the sphere of Anglo-Muhammadan Law, and cannot affect the discretionary power given to the judge by the Indian Evidence Act, s. 114, of presuming any fact which he thinks likely, having regard to the ordinary course of nature. It has accordingly been said, with reference to a child born some nineteen months after the mother's divorce, that " notwithstanding Muhammadan Law, a Court of Justice cannot pronounce a child to be the legitimate offspring of a particular individual when such a conclusion would be contrary to the course of nature and impossible ; " *Ashruf Ali*, 16 W. R., 260 (1871).

The modern Egyptian Code (Art. 332) confirms the two years' limit, but with a phrase indicating full consciousness that law is here in conflict with science. " La durée la plus courte de la gestation est de six mois, la durée ordinaire est de neuf, et la plus longue est de deux ans *légalement*." The Algerian Courts, on the other hand, by laying stress on the silence of the Koran, as leaving room for the exercise of private judgment, managed to obtain the sanction of their Muhammadan law officers for a superior limit of ten months though the accepted Maliki doctrine is even more extravagant than the Hanafi—four years instead of two. Clavel, D.M., vol. i, p. 271.

Claim of lawful parentage conclusively barred after two years.

82. If a child is born more than two years after the dissolution of a marriage by death or divorce, this fact is conclusive proof that the child is not the fruit of such marriage.

Baillie, 395. On this point there is no conflict between Muhammadan Law and the general law of British India, and therefore no uncertainty.

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* The French Law fixes 300, the Prussian 301 days as the superior limit. The English Law leaves the question quite open ; but the recorded verdicts of juries, and of judges deciding questions of fact without a jury, in questions of legitimacy, divorce and affiliation, have tended, so far, to fix the superior limit of possibility between 294 and 299 days, and the inferior limit at something over 229 days. See Taylor's Medical Jurisprudence, vol. ii, pp. 247 to 270, and other authorities quoted in *Tikam Singh* v. *Dhan Khunwar*, 24 All., 445 (1902) ; in which case it was said that a 365 days' gestation was perhaps not absolutely beyond the bounds of possibility, but on the facts of the particular case the only reasonable finding was against it.

83. (*Submitted.*) The rule of the Indian Evidence Act, s. 121, that legitimacy is conclusively presumed from birth during the continuance of a valid marriage or within 280 days after its termination, unless it be shown that the married parties had no access to each other at any time when the alleged child could have been begotten, is really, notwithstanding its place in the statute book, a rule of substantive marriage law rather than of evidence, and as such has no application to Muhammadans, so far as it conflicts with the Muhammadan rule that a child born within six months after the marriage of its parents is not legitimate.

Does s. 112 of the Evidence Act apply to Muhammadans.

In *Muhammad Allahdad's* case, 10 All., 289 (1888), at p 339, Mahmood, J., said : " It may some day be a question of great difficulty to determine how far the provisions of that section are to be taken as trenching upon the Muhammadan Law of marriage, parentage, legitimacy, and inheritance, which departments of law under other statutory provisions are to be adopted as the rule of decision by the Courts in British India. Fortunately, the difficulty does not arise in this case." Mr. Field, in his book on the Law of Evidence in British India, says (p. 552) : " It may be supposed that the provisions of this section will supersede certain rather absurd rules of Muhammadan Law by which a child born six months after marriage, or within two years after divorce or the death of the husband, is presumed to be his legitimate offspring." The second of these rules has been already discussed ; the first may be impolitic, but is certainly not absurd, as compared with the English rule, from which it only differs by deviating less widely from known physiological laws. The English rule would be in the highest degree irrational if intended to assist Courts of Justice towards a sound conclusion as to a matter of fact, and not very easy to defend as a rule of procedure, intended to protect litigants and witnesses against annoyance disproportionate to the importance of the matter to be proved. The real reason for it is the expediency of encouraging couples who have come together irregularly in the first instance to prevent further mischief by going through the marriage-ceremony before the birth of a child. What it means to say is, *not* that the child born the day after the wedding shall be taken to have been conceived within twenty-four hours of its birth, *but* that the child who was conceived as a bastard shall be considered as legitimatised before birth by the intervening marriage. It is, in fact, an exception, on grounds of public policy, to the general principle that the legal existence of an infant dates from its conception, not from its birth. Consequently its place in a scientifically arranged Code would be in the department of Family Law, rather than in that of Procedure or Evidence, and if so, it is not applicable to Muhammadans. Thus the question which the Courts will some day have to decide is practically, whether the collocation or the real nature of s. 112 of the Indian Evidence Act is to determine the department of law to which it belongs, and consequently the range of its application.

The opinion here expressed has been criticised by a learned writer * on the ground that the rule of the Evidence Act, whether it be a rule of substantive law or of evidence, " finds its place in an enactment which applies to *all* classes of persons in British India." What the Act itself says is (s. 1) that " it extends

* See Mulla's Principles of Mahomedan Law, p. 135.

to the whole of British India, and applies to *all judicial proceedings in or before any Court.*" Does not this rather suggest that its provisions were not intended to supersede any existing rules except rules governing the conduct of judicial proceedings, as distinguished from rules governing the substantive rights of the parties? It should also be observed that all statutory provisions now in force, which prescribe the application of Muhammadan Law to questions of marriage and inheritance (with special mention of bastardy in some cases) are posterior in date to the Indian Evidence Act, and must therefore prevail in case of direct conflict.

See also s. 88 below.

Paternity presumed from presumptive marriage.

84. In all cases[1] in which marriage may be presumed from cohabitation combined with other circumstances, for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purpose of establishing paternity.[2]

[1] As to these, see s. 30, *ante*.

[2] *Hidayat Oollah*, 3 Moo. I. A., 295 (1844); s.c. *Shumsoonnissa Khanum*, 6 W. R., (P. C.) 52. In this case the Privy Council considered that there had been "a consecutive course of treatment both of the mother and of the child for a period of between seven and eight years, which would not have been adopted except on the presumption of cohabitation and of the son being the issue of the putative father" (p. 325). And see *Mahomed Bauker*, 8 Moo. I. A., 137 (1860), at p. 157, as cited under s. 86, *post*.

Presumption of paternity from acknowledgment, when conclusive.

85.[1] If a man has acknowledged another as his legitimate child, the presumption of paternity arising therefrom can only be rebutted by—

(*a*) Disclaimer on the part of the person acknowledged, he or she being of an age to understand the transaction;[2] or

(*b*) Such proximity of age, or seniority of the acknowledgee, as would render the alleged relationship physically impossible;[3] or

(*c*) Proof that the acknowledgee is in fact the child of some other person;[4] or by

(*d*) Proof that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledger at any time when the acknowledgee could have been begotten.[5]

Explanation.—A mere casual acknowledgment of the fact of paternity, not intended to confer the status of legitimacy, will not have that effect.[6]

[1] See on this subject generally, Baillie, 405; Hed. 439; Macnaghten, p. 61; also Prec. vi, 46, p. 299, showing incidentally that daughters as well as sons may be legitimated by acknowledgment, which also appears from *Dhan Bibi*, 27 Cal., 801 (1900). See also *Sadik Husain Khan*, L. R., 43 I. A., 212 (1916).

[2] See *Kedarnath* v. *Donzelle*, 20 W. R., 352 (1873); *Oomda Bibee*, 5 W. R., 132 (1866).

[3] Baillie and Hedaya, references as above.

[4] Admitted on both sides in *Nujeeboonnissa* v. *Zumeerun*, 11 W. R., 426; s.c. *In the matter of the petition of Mt. Bibi Nujibunnissa*, 4 B. L. R., App. Civ., 55 (1869). See also *Usmanmiya*, 40 Bom., 28 (1915).

[5] In two Privy Council cases, *Mahammad Azmat Ali Khan*, 8 Cal., 422 (1881), at p. 428, and *Sadakat Hossein*, 10 Cal., 663; s. c. L. R., 11 I. A., 31 (1883), some observations of their Lordships seemed to imply that legitimation might be effected by acknowledgment in spite of proof that the mother of the acknowledgee was not the wife of the father at the time of the acknowledgment; but in both cases a marriage had been alleged and had simply been held not to be proved. Hence in *Muhammad Allahdad*, 10 All., 289 (1888), Mahmood, J., felt himself still at liberty to maintain (p. 337) that "there is no warrant in the principles of the Muhammadan Law to justify the view that a child proved to be the offspring of fornication, adultery, or incest could be made legitimate by any act of acknowledgment by the father. I repeat (said he) that the rule is limited to cases of *uncertainty* of legitimate descent and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment." But this again was merely *obiter dictum*, because he and his brother judges agreed that there was uncertainty as to whether the marriage, which confessedly took place at some time or other, was before or after the conception of the claimant, and decided in his favour on that ground.

In *Sadakat Hossein*, above referred to, the Privy Council considered that they were relieved (by the view which they took of the evidence) "from offering any opinion upon the very important question of law which was raised by the counsel for the appellant; namely, whether, if there had been this marriage (*i.e.* between the mother of the claimant and a third person, subsisting at the time of her connection with the acknowledger and of the conception of the claimant) the offspring of an adulterous intercouse could have been legitimated by any acknowledgment."

In *Liaqat Ali*, 15 All., 396 (1893), it was distinctly found that the mother of the acknowledgee was the undivorced wife of another person at the time when she married the acknowledger, and it was held, on the authority of what was called the "ruling" in *Muhammad Allahdad's* case (see above), that this defect could not be cured by any acknowledgment of legitimacy, though coupled with proof of fifteen years' cohabitation with the mother. Apparently no report of this case, which was decided on June 20th, 1893, had reached the learned counsel who had to argue before the Privy Council the case of *Abdul Razak*, 21 Cal., 666, and L. R., 21 I. A., 56, in November of the same year, nor was the *dictum* of Mahmood, J., in *Muhammad Allahdad's* case cited against the claimant, though the decision itself was cited in his favour. A remark which fell from their Lordships shows incidentally that on this question they were disposed to take the same ground as was taken by their predecessors in *Sadakat Hossein's* case, and to draw the same distinction between simply illicit and adulterous intercourse as a bar to subsequent legitimation. They said (p. 678):

"The learned counsel for the respondents did not deny that Abdul Hadi might have married Mah Thai, as no doubt he might have done if she had embraced Islam, *nor did they contend that the intercourse between Abdul Hadi*

and Mah Thai was of such a character as to prevent the possible legitimation of the offspring." But the actual decision turned on another point. [See the next note.] With all respect to the Privy Council, it is impossible not to agree with Mahmood, J., that the suggested distinction is wholly foreign to Muhammadan Law, which includes fornication, adultery, and incest (in a word, all forms of intercourse not legalised by marriage or proprietorship), under the one appellation of *Zina*, and subjects all alike to the ban of the criminal law. An acknowledgment of paternity, coupled with an admission that the child was a *walad us zina*, and therefore that both parents were liable to severe punishment, would be most unlikely to be made in a Muhammadan country—though it is true that such a case is imagined for the sake of argument in the Fatawa Alamgiri (Baillie, 411, cited in 10 All., at p. 314), and the opinion of the compiler thereupon is that the descent is *not* established by such a self-condemning acknowledgment. On the other hand, a Moslem in a Moslem country, acknowledging a child of unknown parentage without expressly admitting him to be a child of fornication, would feel tolerably secure against having the crime brought home to him, owing to the peculiar rule of evidence already noticed. But the commonest instances of acknowledgment would be those of children born from slave concubines, with respect to whom the master would be equally within his rights whether he chose to confer upon them the status of sons, or to leave them in the condition of their mothers. The threefold action of the British Government in abolishing (1) slavery, (2) the Muhammadan Criminal Law, and (3) the Muhammadan rules of evidence, has given an entirely new character to legitimation by acknowledgment, and it is no wonder that the Courts should have been somewhat puzzled how to deal with it. Since the publication of the first edition, however, the authorities in support of the proposition in the text have been strengthened by decisions of the Calcutta High Court, viz. *Aizunnissa Khatoon*, 23 Cal., 130 (1895), and *Dhan Bibi*, 27 Cal., 801 (1900). The latter is especially weighty, both because all the Privy Council cases above mentioned were fully considered, and the remarks cited therefrom shown to be merely *obiter dicta*, and because the claimant was not the child of adultery, as in *Liaqat Ali*, or of an incestuous marriage, as in *Aizunnissa Khatoon*, but of simple fornication, thus confirming the view above expressed as to the untenability of the suggested distinction.

Since the publication of the third edition, it has been held in Bombay, on the authority of *Muhammad Allahdad*, *Liaqat Ali*, and *Dhan Bibi*, that a child born of *Zina* (*i.e.* either simple fornication, adultery, or incest) cannot be legitimated by acknowledgment. The child in this case was *born* after divorce of the mother by her first husband, but before re-marriage to the acknowledger. It did not appear whether or not the *conception* took place while the mother was still the wife of her first husband ; but the Court held this to be immaterial ; *Mardansaheb*, 34 Bom., 111 (1909). On the strength of this additional authority I have ventured to delete the qualifying words " it seems," previously prefixed to clause (*d*).

[6] *Ashruf-ood-dowla*, 11 Moo. I. A., 94 (1866), followed by the P. C. in *Abdul Razak*, 21 Cal., 666 (1893), at p. 678

" The learned counsel for the appellant cited various texts which, taken apart from the context, would seem to show that any admission of paternity, though made casually and not intended to have a serious effect, would be sufficient to confer the status of legitimacy. It is not, in their Lordships' opinion, necessary to examine these ancient authorities, or to inquire how far they are applicable to a state of society very different to that which existed at the time when they were promulgated. Their Lordships are bound by the decision of this Board, which is clear upon the point. The question arose in the case of *Ashruf-ood-dowla Ahmed Hossein* v. *Hyder Hossein Khan*." They proceed to point out that the issue in that case, approved by their predecessors

as having been very correctly framed, was, " has the deed of repudiation the effect of cancelling a previous acknowledgment of defendant's legitimacy, if such were made ? "—thus substituting for the ambiguous word " sonship," which might include an illegitimate son, the word " legitimacy," and using the word " acknowledgment " in its legal sense, under the Muhammadan Law, of acknowledgment of antecedent right, established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of " legitimacy as a son." But though the acknowledgment in express terms may be only an acknowledgment of sonship, the circumstances of the case may justify an inference that it was an acknowledgment of legitimacy also : *Usmanmiya*, 40 Bom., 28 (1915). The Muhammadan Law as to acknowledgment of paternity thus mixes up two things which by the French Code Napoléon are carefully distinguished, and entail widely different consequences : namely, (1) legitimation by subsequent marriage with the mother, and (2) public acknowledgment of a natural child as such. Contrast Articles 331—333 of that Code with 334—339

86. An acknowledgment need not be formal, nor even express, in order to have the effect mentioned in s. 85. It may be itself presumed from the fact of one person having habitually treated another as his son—that is, as having the status of a son.

Presumption from habitual treatment.

In *Mahammad Azmat* v. *Lalli Begum*, 8 Cal., 422 ; L. R., 9 I. A., 8 (1881), the Privy Council said :—" It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Muhammadan as his sons may be inferred from his having openly treated them as such." This is, perhaps, sufficient authority, though in the particular case before them their Lordships considered that there had been actual acknowledgment as well as a course of treatment corroborating it, and though the other cases spoken of are not specified, and I have been unable to find any amounting to actual decisions on the point. In *Mahomed Bauker*, 8 Moo. I. A., 136 (1860), the decision was against the legitimacy, but their Lordships " wished (p. 159) to be distinctly understood as not denying or questioning the position that according to the Muhammadan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation."

87. An acknowledgment once made cannot be revoked.

Baillie, 408. In *Ashruf-ood-dowlah's* case, 11 Moo. I. A., 94 (1866), the reputed father had executed a formal deed of renunciation, declaring the respondent not to be his son, but the P. C. admitted that this would have been inoperative had a previous acknowledgment been proved, and only took it into consideration as tending to throw doubt on the fact of acknowledgment.

88. The establishment of paternity by acknowledgment, though described for convenience as a legal presumption, is not a mere rule of evidence, but an integral portion of Muhammadan Family Law, and the conditions under

Acknowledgment not a mere matter of evidence.

which it will take effect must be determined with reference to Muhammadan authorities rather than to the Evidence Act.

This was agreed in by all the three judges in *Muhammad Allahdad's* case, though the contrary had been maintained in argument, and though they differed among themselves as to the precise rules deducible from the Muhammadan authorities. Mahmood, J., referred to the "uniform practice of the Courts in India and of the Privy Council in dealing with such questions as falling within the province of the Muhammadan Law of inheritance and marriage." That this was the accepted view in Macnaghten's time (1825) may be inferred from his noticing acknowledgments in his chapter on "Marriage, Dower, Divorce, and Parentage," not in that on "Claims and Judicial Matters." Thus for practical purposes it is now unnecessary to go back to the ancient law-sources, which were, however, very carefully examined by Straight and Mahmood, JJ., in the last-mentioned case (see 10 All., pp. 305—318 and 325—342.) We could not reasonably expect to find in them a direct answer to a question which had no meaning so long as all parts of the law of Islam were enforced alike; nor do we. We have to make what we can of oblique indications, which do not all point the same way. Thus in the Hedaya we find the rule only in the Book dealing with Acknowledgments generally, which are in their nature matters of evidence; but in the Fatawa Alamgiri it is mentioned in connection with Divorce, and again in connection with Parentage. Both books give as the reason for the condition as to the relative ages of acknowledger and acknowledgee that "if it were otherwise, it is evident that the acknowledger has spoken falsely," which seems to imply that it is a mere rule of evidence. But, on the other hand, both books expressly contrast this kind of acknowledgment, which confers on the acknowledged son a right of inheritance enforceable against third persons, with ordinary acknowledgments, which bind only the acknowledger himself; *e.g.* the acknowledgment of a person as a brother gives no right to inherit as such except on failure of all known heirs (see s. 263, *post*).

In *Imambandi's* case (1918), L. R., 45 Ind. App., 73, at p. 82, the Privy Council, citing an earlier case, treated the rule of acknowledgment of legitimate paternity as a rule of Muhammadan Law. Clear evidence that a Muhammadan acknowledged children as his legitimate issue raises a legal presumption of a valid marriage between him and the children's mother. See also *Sadik Husain*, L.R., 43 Ind. App., 212 (1916), at p. 234: statements made by a member of a family, touching the sonship or heirship of a person, are, according to Muhammadan Law, good evidence of the family repute concerning him.

Maternity.

89. Maternity is a pure question of fact. In other words, except in so far as there are conflicting claims on the ground of paternity, whatever is said in Hanafi Law concerning the legal relation of mother and child applies to the woman who actually gave birth to that child, irrespective of the lawfulness of her connection with the begetter, and to no one else.

This is a somewhat broader statement than I have found in any one passage, but it seems fairly inferable from the general silence of the books as to any

sort of artificial maternity, or as to any distinction between one kind of motherhood and another. Baillie, p. 411, is a direct authority for the most important application of the principle. "When a man has committed *zina* (fornication) with a woman, the descent of the son from the man is not established; but it is established from the woman by the birth." And see now *Bafatun* v. *Bilaiti Khanum*, 30 Cal., 683 (1903). That the Shia Law on this point is otherwise shown below, s. 448

CHAPTER V.

GUARDIANSHIP.

Did He not find thee an orphan, and gave thee a home ?
And found thee erring and guided thee ?
And found thee needy and fulfilled thy wants ?
Then wrong not the orphan,
Nor repel the beggar with harshness;
And proclaim the bounty of thy Lord !

Koran, xciii, 6–11.

Three kinds.

90. Anglo-Muhammadan Law recognises three kinds of guardianship, namely :—

(1) Guardianship for contracting marriage on behalf of a minor or insane adult of either sex, and for controlling to some extent the matrimonial arrangements of a sane adult woman, in accordance with the rules stated in Chap. II.

(2) Guardianship of the person of a minor for custody and education.

(3) Guardianship of the property of a minor.

The rules under the first head depend exclusively upon Muhammadan Law. Those under the other two heads depend partly on Muhammadan Law, and partly on the general law of India, as now embodied chiefly in the Guardians and Wards Act, 1890.

" Guardian " is defined in the Act as " a person having the care of the person of a minor, or of his property, or of both his person and his property " ; and no doubt the individual who has by law the right and duty of disposing of a boy or girl in marriage may be said to have, for that limited purpose, the care of his or her person. But there is no mention of disposal in marriage in any part of the Act, and nothing to indicate that it was intended to interfere with the rule of Muhammadan Law, which assigns that function, under the name of *jabr*, to relatives who are not necessarily those entitled to the general care and direct custody (*hizanat*) of the ward's person. See the commentary on s. 117 of this Digest (=24 of the Act).

GUARDIANSHIP FOR MARRIAGE.

91. With reference to this kind of guardianship, " minority " means physical immaturity for the purposes of marriage.[1] In default of evidence as to puberty, a minor of either sex is to be considered adult on the completion of his or her fifteenth year.[2]

Meaning of minority for marriage.

[1] " Puberty and majority are in the Mussulman Law one and the same." Hed. 529 (Book XXXV, chap. ii), translator's footnote. The original source of this doctrine is probably the Koranic precept (K. iv, 6). " Prove orphans until they reach a marriageable age, and if ye perceive in them right management, then hand over to them their property."

[2] This is given in the Hedaya (*ubi sup.*) as the opinion of the " two disciples," which the compiler apparently prefers to that of Abu Hanifa, who considered that to establish the puberty of a boy nineteen years are required, and (according to one report of his opinion) seventeen years for a girl.

Macnaghten, p. 62, is clearly wrong in fixing the age of majority at the end of the *sixteenth* year.

92. (*Submitted.*) (1) The rule of Muhammadan Law, that boys and girls can terminate their own minority by simply declaring that the physical signs of puberty have appeared, and that such a declaration must be accepted as conclusive proof of the fact, provided that they are of an age when it might be expected in the ordinary course of nature,[1] is a rule of evidence rather than of substantive law, and as such has been superseded by the Indian Evidence Act, under which no testimony is conclusive proof of the fact asserted.

Puberty, how proved.

(2) Having regard to Act X of 1891, no evidence of actual puberty will terminate a girl's minority within the meaning of the preceding section, until she has completed her twelfth year.[2]

[1] Hed. 529. " When a boy or girl approaches the age of puberty (' at a probable season,' is the editor's headnote), and they declare themselves adult, their declaration must be credited, and they become subject to all the rules affecting adults ; because the attainment of puberty is a matter which can only be ascertained by their testimony, and consequently, when they notify it, their notification must be credited, in the same manner as the declaration of a woman with respect to her courses." In 1840 the Muhammadan Chief Kazi gave an opinion to this effect in the case of a girl, and his opinion was adopted by the Court (1 Morl. Dig. 303). But at that period, owing to the absence of any well-ascertained territorial law of evidence, it was quite usual to take account of the Muhammadan rules of evidence in suits between Muhammadans, and perhaps in native suits generally, so that the case proves nothing as to the present law. The reason assigned for the rule in the Hedaya seems to mark

it as a mere rule of evidence, notwithstanding the fact that the passage is found in the chapter on Inhibition, not in the chapter on Evidence. It is hardly a reason which would commend itself on its own merits to a judge who had a discretion in the matter; for, granting that no other testimony would be obtainable, why should that testimony be accepted if the demeanour of the witness was suspicious, or if she had evidently a motive for falsehood? If the consequence of the declaration being disbelieved were to postpone "the option of puberty" of the girl (or boy) to the age of fifteen, that would not, according to modern ideas, be so very deplorable.

[2] It is said in the Fatawa Alamgiri (Baillie, p. 54) that when the question is raised between the husband of the child-wife asserting, and the father denying that she is fit for cohabitation, "then, if she be a person who usually goes abroad (*i.e.* I suppose, if she is in a humble rank of life), the judge is to compel her to appear before him, and determine himself as to her competency; but if not, he should direct women in whom he can confide to inspect her." It seems, however, that this course cannot be taken in British India, it having been laid down by the High Court of Calcutta that no Court or magistrate has any right to order the medical examination of a (female) witness, and that such an examination is an illegal and unjustifiable assault, for which damages may be recovered; *Q.E.* v. *Guru Charan Dusadh* (not reported, but referred to by Sir Andrew Scoble in his speech in the Legislative Council on the Age of Consent Bill, 1891).

Order of guadianship in marriage.

93. The right to contract a marriage irrevocably on behalf of a minor of either sex belongs to (1) the father, and, failing him, to (2) the father's father, how high soever.[1] Failing these, the right to contract the minor in marriage provisionally, *i.e.* subject to the option of repudiation (otherwise called the option of puberty), devolves upon (3) the brothers and remoter male paternal relatives, in the same order as for inheritance.[2] Failing these, it devolves (probably) upon (4) the mother, and (5) the maternal kindred within the prohibited degrees,[3] and, failing all these, it certainly devolves in the last resort upon the Government.[4]

[1] See s. 18 (*a*), *ante*.

[2] Hed. Book II, chap. ii, p. 36, referring to a saying of the Prophet—"Marriage is committed to the paternal kindred," and p. 37, "Relations stand in the same order in point of authority to contract minors in marriage as they do in point of inheritance. As to the order of inheritance, see Chap. VIII of this Digest. In Baillie's Digest, p. 45, it is pointed out that the order of inheritance among male paternal relatives begins with the son; and, without directly adverting to the obvious fact that a girl under the age of puberty cannot have a son, the writer proceeds to note a difference among the Hanafi authorities as to whether the father or son of an *insane woman* has the prior right of guardianship, and recommends that the legality of the marriage should be assured by the father directing the son to give her in marriage. Then, after setting out in full the list of agnates as far as third cousins, he concludes, "All these guardians have the power of compulsion over a female or a male during minority, and over insane persons though adult." Even apart from the absurdity of a

minor being under the guardianship of his or her son or grandson, it is, as we shall see, not strictly accurate to speak of any guardian other than a father or father's father having a power of compulsion over minors in the matter of marriage. In the Hedaya, p. 39, the guardianship for marriage of lunatic women is treated, as it should be, quite separately from that of minors; the same question as to priority of father or son is discussed in that connection, apparently with a preference for the son.

[3] Hed. p. 38. "In defect of paternal relations, authority to contract marriage appertains to the maternal (if they be of the same family or tribe), such as the mother, or maternal uncle or aunt, and all others within the prohibited degrees, according to Haneefa, upon a principle of benevolence. Muhammad alleges that this authority is not vested in any except the paternal kindred; and there is also an opinion of Haneefa on record to this effect. Of Aboo Yoosuf two opinions have been mentioned; according to that most generally received, he coincides with Muhammad, and their arguments on this subject are twofold: First, the Prophet has declared "Marriage is committed to the paternal kindred" (as was before quoted); secondly, the only reason for instituting this authority is that families may be preserved from improper or unequal connection, and this guard over the honour of a family is committed to the paternal relatives, whose peculiar province it is to take care that their stock be not exposed to any mean or debasing admixture, so as to subject them to shame. The argument of Haneefa is that authority to contract marriage is instituted out of a regard for the interest of the child, which is fully manifested by committing it to persons whose relation to the infant is so near as to render them interested in its welfare."

The view stated first and last in this nice balancing of authorities is presumably that favoured by the writer, and it is also that to which an Indian judge would naturally incline if he felt himself free to choose. It seems to be supported by Macnaghten, at p. 63 (Princ. viii, 7).

Here, again, the corresponding passage in Baillie's Digest, p. 46, is a very strange one, reckoning *daughters, granddaughters, and great-granddaughters* among the possible guardians of an unmarried minor, and carrying on the list far beyond the prohibited degrees in a series with numerous unexplained gaps. But it accurately represents the Fatawa Alamgiri (vol. i, p. 400), and I can only suppose Abu Hanifa's meaning to have been that the female uterine relatives inherit, in default of *asabah*, in the order stated, and that the guardianship for marriage will devolve in that order on *such adult and qualified women* as may happen to exist in any of the categories specified.* In dealing with the guardianship of *asabah* on the preceding page, the compiler avoids the difficulty by putting the case, not of a minor but of an insane woman. Another puzzling feature in the list of *zawi 'l arham*, here attributed to the founder of the Hanafi school, is that it includes the son's and son's son's daughter, who according to the now accepted doctrine of that school, may inherit as Sharers or Residuaries.

[4] Hed. 39. The Guardians and Wards Act, 1890, contains nothing about guardianship for marriage; but presumably the Court, as defined in the Act,† would represent the Government for this purpose, except in cases within the jurisdiction of a Court of Wards.‡ Even in the case of a ward of the District Court, it is not the function of the Court to act as a match-maker. The choice

* The same order is given, also without explanation, in the modern Egyptian Code of Hanafi law. See Clavel, Droit Musulman, vol. i, p. 29, and vol. ii, p. 269.

† *I.e.* either the District Court or the High Court within the local limits of its original civil jurisdiction. See sub-ss. (4) and (5) of s. 4 of the Act.

‡ Such cases are, broadly speaking, those in which the minor is proprietor of an estate paying revenue direct to Government. For particulars, see the enactments for different provinces enumerated under s. 105, *post*.

must be made in the first instance by the guardian for marriage, and if the Court was satisfied that it was not unsuitable, it must sanction it: *Monijan Bibi*, 42 Cal., 351 (1914).

A Muhammadan, after having divorced his wife, applied to be appointed guardian of his infant daughter, who was very close upon her majority, with the object of giving her in marriage to a suitable bridegroom: the Court refused the application on the ground that, at her age, the girl's consent to the marriage was required; *Ahmad Ali* v. *Raisunnessa*, 17 C. W. N. 429 (1913).

Rule in case of absence of the nearest guardian.

94. If, from absence at such a distance that communication would be tedious or difficult,[1] or from any other cause,[2] the proper guardian or guardians for marriage are unable to act, it is lawful for the guardian next in degree to contract the minor in marriage.[3] And it seems that the mother or grandmother may act in such an emergency to the extent of contracting a marriage, which will not be annulled unless shown to be unsuitable, whether or not she is the guardian next in degree, and without reference to the question whether she comes properly within the series of guardians at all.[4]

[1] Hed. 39. The expression used is Gheebat-Moonkatat, by which "is to be understood the guardian being removed to a city out of the track of the caravans, or which is not visited by the caravan more than once a year:" some, however, have defined it to mean any distance amounting to three days' journey. Of course, some different measure of difficulty would have to be adopted in modern India. Probably the three days' journey test may commend itself as a rough guide where the expense of the journey is not prohibitive with reference to the means of the guardian. But perhaps the best test would be to estimate "the chance of losing a present suitable match while inquiry is made for the opinion of the absent guardian" (Baillie, 49). So that if the nearer guardian be concealed in the city, he is not to be waited for, but is to be accounted "absent" in this connection.

[2] No "other cause" is specified in the Hedaya; but in *Kaloo* v. *Gureeboollah*, 10 W. R., 12 (1868), the Calcutta High Court refused to dissolve the marriage contracted for a female minor by her mother and grandmother, without the consent of her grandfather's brother, who was confessedly her nearest paternal relation; it appearing that he was in jail on conviction for murder, that he was not likely ever to come out again, and that he had never taken any interest in the girl. No inquiry appears to have been made as to the existence of any remoter paternal kindred. And in *Mahin Bibi*, noticed on another point under the next section, the Court seems to have assumed that if the father was shown to be disqualified, the validity of the marriage contracted by the mother necessarily followed.

[3] It is said (Baillie, 49, and Hed. 698) that when a minor, male or female, has two guardians equal in degree, as two brothers or two paternal uncles, and either of them contracts the minor in marriage, the transaction is lawful, and that it makes no difference whether the other of them allows or cancels the marriage. It is a forcible illustration of the anti-Malthusian tendency of Islam that two or more co-guardians should be thus encouraged to race for priority in negotiating marriages for their ward. For Kazi Khan, as translated by

Mahomed Yusuf, tells us expressly that in the case of a female minor contracted by her two guardians to two different men, the marriage which is prior in time will alone hold good (subject, of course, to the option of repudiation at puberty), but that if the priority cannot be ascertained both will be void (M.Y., vol. ii, p. 90). The translator seems to consider that in the case of a male ward the question of priority would be immaterial, inasmuch as there would be no legal objection to his having two wives at once. Kazi Khan records at the same time the contrary opinion of Malik, to the effect that neither of two co-guardians can act without the other—a rule which might conceivably prevent a woman from ever getting married, seeing that by Maliki Law even an adult woman cannot marry without the intervention of a guardian.

As to the Shafeite Law, see s. 392, *post*.

[4] See the cases cited in Note 2. According to some authorities, if the nearest guardian, being present and able to act, refuses a good offer of marriage without any plausible reason, this does not give any right of intervention to the guardian next in degree, but it is for the Court to examine the reasons for refusal, and if it finds them insufficient to accept the marriage on behalf of the minor. See Clavel, Droit Musulman, vol. i, p. 35, and vol ii, p. 270 (Art 26 of the Egyptian Code); Ameer Ali, M. L., Vol. II, 235.

95. It seems that, notwithstanding Act XXI of 1850, a father who has apostatised from the Muhammadan religion is so far disqualified for marriage guardianship that a marriage contracted for his minor daughter by her mother will not be necessarily invalid for want of his consent. But it is doubtful how far this disqualification extends.

Doubt whether apostasy disqualifies.

Mahin Bibi, 13 B. L. R., 160 (1874).

As to the Muhammadan Law, see Hed. 392, compared with Baillie, 48, 173, showing that all acts of an apostate, whether with regard to his property or to his children, are null and void unless and until he recants, in which case they are apparently treated as valid *ab initio*. For Act XXI of 1850, see under s. 156, noting particularly the words "forfeiture of *rights or property*." In so far as guardianship is merely a *right*, it is evidently preserved by the Act; the only question is whether the *duties*, attached to the office by the Muhammadan Law, and affecting the interests of other Muhammadans, can be properly performed by an unbeliever. This question was answered in the affirmative by the Calcutta High Court in *Muchoo* v. *Arzoon*, 5 W. R., 235 (1866), so far as regards the custody and education of Hindu children, old enough not to be absolutely dependent on the mother's care, but not old enough to form an intelligent preference for one religion over another. That case was approved and followed by the Chief Court of the Panjab in *Gul Muhammad*, 36 Panj. Rec., 191 (1901), where the father, a convert from Muhammadanism to Christianity, was the only living parent of a boy aged eight, and a girl aged four, and the competing applicant for the guardianship of their property and persons was a paternal grandmother. Neither of these rulings bear directly on the question of *guardianship for marriage*, as to which the above-mentioned case of *Mahin Bibi* is so far the only authority, but not a very conclusive one, having been decided by a single judge, whose judgment, as reported, takes no notice either of the Act of 1850 or of the ruling in *Muchoo* v. *Arzoon*, and the facts being rather peculiar. The father, originally a Jew, had turned Muhammadan and married as such, and subsequently reverted to his old faith; after which his wife left him, taking with her a daughter, and having disposed of the latter

in marriage, at the age of ten, to a Muhammadan (the father not consenting), resided for a time with her son-in-law and his child-wife. Then the mother and father became reconciled and jointly induced the girl to leave her husband who, however, recovered possession by applying to a magistrate and proving the marriage to his satisfaction. Thereupon the father took out a writ of *habeas corpus* against the husband, which was quashed by the High Court on the ground stated in the text. It does not necessarily follow that, had the father taken the initiative in arranging a suitable Muhammadan marriage for his daughter, the same judge might not have held it binding notwithstanding his apostasy; just as the Bombay High Court, in the converse case of a Hindu converted to Muhammadanism, held that his change of religion and loss of caste did not prevent him from giving his son in adoption to another Hindu still within the pale of orthodoxy; *Shamsing* v. *Santabai*, 25 Bom., 551 (1901). In that case also the decision might have been different had the father used his power for the purpose of breaking, instead of strengthening, his son's attachment to his old religion.

Who may contract marriage for a lunatic.

96. The guardians for marriage of a lunatic[1] are the same relatives who would be guardians for that purpose of a minor, except that sons and son's sons, how low soever, come in before the father,[2] and (probably) daughters and grand-daughters next after the mother.[3]

[1] See s. 21, *ante*.

[2] Baillie, 45, where only the guardianship of an insane *woman* is expressly mentioned; but at page 49 it is said that a son is the guardian of his lunatic father for contracting him in marriage, though not as regards his property. The preference of the son to the father or grandfather as guardian of a female lunatic is given as the opinion of Abu Hanifa and Abu Yusuf, against that of Muhammad, but it is added, "It is better, however, that the father should direct the son to give her in marriage, so that it may be lawful without any difference of opinion."

[3] Baillie, 46, where the series beginning with the mother and *daughter* is given as that of guardians for the marriage of a boy or girl, which is absurd. It must, I think, be meant for the continuation of the order given on the preceding page of that work for guardians of an insane woman.

96A. The General Law of India respecting the guardianship, *ad litem*, of minors and persons of unsound mind, will be found in Order XXXII of the Code of Civil Procedure (Act V of 1908).

THE GENERAL LAW OF INDIA RESPECTING THE APPOINTMENT AND DECLARATION OF GUARDIANS OF THE PERSONS AND PROPERTY OF MINORS.

Power of the Court to make orders as to guardianship.

97. Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(*a*) *Appointing* a guardian of his person or property, or both; or

(*b*) *Declaring* a person to be such a guardian, the Court may make an order accordingly.

This is s. 7 (1) of the Guardians and Wards Act, 1890. By s. 4 (5) of the Act, "the Court" means the District Court throughout the Act, and consequently throughout this chapter—not the Court of Wards, which is always referred to under that title, and which deals exclusively with minor proprietors of estates paying revenue to Government; nor the local Civil Court in which ordinary suits are instituted in the first instance, it being apparently thought that questions connected with guardianship are of too delicate a nature for any but the principal Civil Court of the district, just as suits relating to the custody of infants (though not suits relating to their maintenance and advancement) are excluded from the jurisdiction of English County Courts. N.B.—"District," as here used, includes the local limits of the ordinary civil jurisdiction of a High Court (s. 2 of the Civil Procedure Code of 1882).

The Bill which is now the Guardians and Wards Act, 1890, was originally introduced into the Legislative Council in 1886 by the then legal member, Mr. Ilbert,* who described its general aim in the following terms:—

"Nothing can be further from my intention than to interfere with native customs or usages, or to force Hindu or Muhammadan Family Law into unnatural conformity with English Law. But on looking into the European British Minors' Act, which was framed with special reference to the requirements of what may be called English minors, it appeared to me that almost all its simple and general provisions were applicable, or might with a little modification be made applicable, to Hindu and Muhammadan as well as to English guardians. . . . Accordingly, what I have done has been to take as my model the European British Minors' Act, which is the latest and fullest of the Indian Acts relating to guardians, and to frame on its lines an Act applicable as a whole to all classes of the community, but containing a few provisions limited in their application to particular classes. . . . *It is not intended by this measure to make any alteration in Hindu or Muhammadan Family Law.*"

The Legislature was so strongly impressed with the delicacy of the task, that it was twice referred to Select Committees and twice to the Local Governments for their opinion, and did not finally become law until after its original promoter had left India. His successor, Mr. (now Sir A.) Scoble, endorsed the above remarks, and in the final discussion a Muhammadan member, Syud Ameer Hossain, expressed the opinion that the great merit of the Bill lay in its permissive character, giving guardians every inducement to place themselves under the control of the Court, but not compelling them to do so. This description, however, is only true in the sense that any one who is entitled to be guardian by the personal law to which he is subject may act as such without any previous judicial sanction *so long as nobody objects*. It will be seen that any person legitimately interested in the matter, who disputes either the legal title or the fitness of the person who is acting as guardian, may apply to have another guardian appointed or declared as the case may be. Hence one inducement to a natural or testamentary guardian to place himself under the Act is that he may thus anticipate any attempt to remove him. A second is the chance of the Government allowing him regular remuneration for his trouble (see commentary on s. 115, *post*). A third is the chance of obtaining from the Court a dispensation from any restriction on alienation of immovable property which may have been imposed by the will or other instrument appointing him (s. 28 of the Act = 123 of this Digest). And a fourth is that he will be able to obtain judicial advice in any difficulty at the expense of the estate, under

* Now Sir Courtenay Ilbert.

s. 33 of the Act, (= 128 of this Digest); whereas if he acts on his own responsibility, even with the advice of a legal practitioner, he may possibly go so completely wrong as to be ordered to pay costs out of his own pocket. On the other hand, he incurs certain liabilities which he might escape by remaining outside the Act; *e.g.* he is liable to penalties for taking his ward out of the jurisdiction without leave (s. 26 (1) of the Act), and he may be required to give a bond, to file a statement as to the property, and to submit periodical accounts, etc.

Another member (Mr. Evans) pointed out that, " on the one hand, they had to provide sufficient safeguards for the persons and properties of minors, and, on the other, to avoid disturbing the habits and feelings of the native community, and also they had to avoid giving fresh facilities for a most undesirable class of harassing litigation, in which infants are used as pawns on the chessboard of litigation in order to harass adult members of the family."

As a matter of fact, it is only under the head of " rights, duties, and liabilities of guardians " that there is any actual abrogation of Muhammadan rules, and it does not amount to very much even there, sub-ss. (1) and (2) of s. 113 being the only clear instances. The question, who are entitled to act as guardians in different circumstances and for different purposes, is left to depend as before on the personal law of the minor, and the innovations chiefly consist in supplying fresh machinery for ascertaining who would be guardians according to that personal law, and for appointing guardians in cases where that law itself would vest the right of appointment in the Government. As regards the period at which guardianship terminates, the Muhammadan Law has been very materially altered, not, however, by this Act, but by the Indian Majority Act, 1875. (See s. 137 below.)

Persons entitled to apply for order.

98. Such an order shall not be made except on the application of—

(*a*) The person desirous of being, or claiming to be, the guardian of any minor ;[1] or

(*b*) Any relative or friend of the minor ;[2] or

(*c*) The Collector of the district or other local area within which the minor ordinarily resides, or in which he has property ; or

(*d*) The Collector having authority with respect to the class to which the minor belongs.[3]

G.W.A. s. 8.

[1] The Guardians and Wards Act, s. 39 (h), contemplates that an applicant for guardianship should reside within the jurisdiction of the Court to which he makes the application : *Asghar Ali*, 36 All., 280 (1914). Under s. 9 of the Act the application for the guardianship of the person should be made where the minor ordinarily resides, and for guardianship of property, either there or where the property is situated. See also s. 102 below.

[2] A Court has no power to appoint its own officer (Nazir) guardian of a minor's property even during the pendency of applications for guardianship, without hearing evidence under s. 13 of the Act, and without a substantive application in that behalf under s. 8 : *Jaiwanti Kumri* 38 Cal., 783 (1911).

[3] The "Collector having authority with respect to the class to which the minor belongs" refers to the definition in s. 4 (6 of the Guardian and Wards Act, which empowers a Local Government to appoint such a special Collector (non-territorial) "for all or any of the purposes of this Act."

Form of application.

99. The application shall state, so far as can be ascertained—

(*a*) The name, sex, *religion*, date of birth, and ordinary residence of the minor;

(*b*) Where the minor is a female, whether she is married, and, if so, the name and age of her husband;

(*c*) The nature, situation, and approximate value of the property, if any, of the minor;

(*d*) The name and residence of the persons having the custody or possession of the person or property of the minor;

(*e*) What near relations the minor has, and where they reside;

(*f*) Whether a guardian of the person or property, or both, of the minor has been appointed by any person entitled or claiming to be entitled *by the law to which the minor is subject* to make such an appointment;

(*g*) Whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor, and if so, when, to what Court, and with what result;

(*h*) Whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both;

(*i*) Where the application is to *appoint* a guardian, the qualifications of the proposed guardian;

(*j*) Where the application is to *declare* a person to be guardian, the grounds on which that person claims;

(*k*) The causes which have led to the making of the application; and

(*l*) Such other particulars, if any, as may be prescribed, or as the nature of the application renders it necessary to state.

G.W.A. s. 10 (1), slightly shortened. S. 11 of the Act deals with the procedure to be followed on admission of the application.

Interim protection of person and property.

100. The Court may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper, but nothing in this section shall authorise—

(*a*) The Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any ; or

(*b*) Any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.

G.W.A. s. 12, part of clause (1) and the whole of (3).

Appointment or declaration of several guardians.

101. If the law to which the minor is subject admits of his having two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them.

G.W.A. 15 (1). The Muhammadan Law certainly admits joint guardianship of property (see under s. 132, *post*) ; whether also of the person, does not appear.

Separate guardians for person and property, or for different properties.

102. Separate guardians may be appointed or declared of the person and of the property of the minor.

If a minor has several properties the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.

G.W.A. 15 (4), (5). Both clauses are quite in harmony with the Muhammadan Law.

As to the first, that law distinguishes, as we have seen, two kinds of guardianship of the person, the guardianship for marriage (*jabr*) and that for custody and education (*hizanat*), which, in the case of an orphan, are more likely than not to belong to different persons ; but both are sharply distinguished from the guardianship of property (*wasiat*), which does not depend on blood-relationship at all, but primarily on testamentary appointment, and, failing that on appointment by the kazi. The *wasi*, however, as defined in the *Fatawa-i*

Alamgiri, not only looks after the property of the testator but also his children (Baillie, 665).

As to the second, see Baillie, 671, where the case is considered of one *wasi* being appointed to pay the debts and another to administer the property, and a difference of opinion is noted as to the precise form of words which will have the effect of excluding each absolutely from the province of the other. From this we may fairly infer that it would be equally within the competence of the testator or the *kazi* to entrust different properties to the care of different *wasis*.

103. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, *consistently with the law to which the minor is subject*, appears in the circumstances to be for the welfare of the minor.

Matters to be considered in appointing guardians.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex, *and religion* of the minor; the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

G.W.A. 17 (1), (2), (3). The enactments previously in force on this subject, *viz.* Act XL of 1858 (s. 27) and XX of 1864 (s. 31), provided that nothing in those Acts should authorise the appointment of any person other than a female as the guardian of the person of a female; and in *Fuseehun* v. *Kajo*, 10 Cal., 15 (1883), these provisions were construed as barring the claims of the uncles against the grandmother to the custody of a girl nearly twelve years old, who had attained puberty in the Muhammadan sense, even supposing that claim to be good according to Muhammadan Law. It appears, from the "statement of objects and reasons" which preceded the passing of the Guardians and Wards Act, 1890, that its framers deliberately refrained from re-enacting these provisions, at the same time specifying "the law to which the minor is subject" as the first matter to be attended to in appointing a guardian, in order to make it quite clear that the Legislature had no intention of interfering with the Hindu or Muhammadan Law.

Three instructive cases under this section have come before the Court since the passing of the Act.

(1) *Saithri* (*in the matter of*), 16 Bom., 307 (1891). Girl of fifteen, receiving a free education at a Christian missionary school, claimed under s. 491 of the Criminal Procedure Code by a Hindu mother who for the last eight years had contributed nothing to her expenses, and was barely able to support herself. Petition dismissed, and girl allowed to go where she would, it being understood that she wished to remain at the school.

(2) *Joshy Assam* (*in the matter of*), 23 Cal., 290 (1895). A Chinaman in indigent circumstances, and about to leave Calcutta, handed over his infant

daughter to a Roman Catholic couple, also Chinese by race, who were comparatively well-to-do, and he afterwards consented to the child being baptised as a Christian, and to her being treated in all respects as their adopted daughter. After the adopters had had the entire charge of the girl for about a year and a half, she being then nine years old, the father and mother returned to Calcutta, and demanded the restoration of their child. They were unable to show that they were any better able to maintain her than before, and it appeared to the Court that their object was to dispose of her in marriage at a profit to themselves. The Court refused the application, considering that, where the parents have deliberately resigned their parental authority, it should be guided mainly by what it conceives to be best for the welfare of the child, and that in this case to remove the girl from her present custody would be to expose her to a mode of life for which her up-bringing had rendered her wholly unfit.

(3) *Makoond Lal Singh*, 25 Cal., 881 (1898). This case was almost exactly the reverse of the preceding. The ward was a boy, born and bred in a Hindu family The father was converted to Christianity, and thereupon deliberately left the boy, then about six years old, in the custody of his grandfather, on whose death he was taken charge of by his maternal uncle, with the consent of his paternal uncle. Six years later the father claimed to have his son restored to him, but the application was refused, both by the District Court and by the High Court, it appearing that his means were very small, and that since his conversion he had contributed nothing to the boy's maintenance; that he had married a Christian wife, the boy's mother being dead; that the boy's Hindu relations were well off, and had treated him well, and that the boy himself preferred to remain a Hindu.

Of course, the decision in all these cases would have been the same, if the father, or the other party claiming custody of the child, had been a Muhammadan, instead of being a Hindu, a Chinaman, or a Christian. As Maclean, C.J., said in the case last cited, "the Court, judicially administering the law, cannot say that one religion is better than another."

It must not be inferred from these cases that the Act requires or permits the Court to subordinate the law to which the minor is subject to the consideration of what will be for his or her welfare. Its plain meaning is exactly the reverse. In none of the three cases was there (in the opinion of the Court) anything inconsistent with the law to which the minor was subject in the course actually adopted. It would hardly have been necessary to insist on this, had not the contrary doctrine been propounded by a recent learned writer.*

As to how far, if at all, a change of religion disqualifies for guardianship of the person of a minor, see cases cited under s. 95. The question, which is "*the law to which the minor is subject*," in such a case as that of *Gul Muhammad* (Panj. Rec. 1901), where the father, having himself become a Christian, had had his infant children baptised, and was allowed to retain his guardianship, does not seem to have been yet considered.

Consent necessary.

104. The Court shall not appoint or declare any person to be a guardian against his will.

G.W.A. 17 (5). This seems to abrogate the Muhammadan rule that if an "executor" (so-called—practically a testamentary guardian of minor's property) has accepted the office in the lifetime of the testator, he cannot with-

* See Mulla, "Principles of Mahomedan Law," pp. 140, 142.

draw after the death of the latter (Baillie, 666; Hed. 697). It is probably not intended to affect the enforcement of such parental duties as are recognised by the personal law of the parties. See *post*, ss. 142—148

105. The Court is not authorised to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—

Guardian not to be appointed in certain cases.

(*a*) Of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person; or

(*b*) Of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor; or

(*c*) Of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

G.W.A. 19. As to the Court of Wards, see—

For Bengal, Bengal Act IX of 1879, amended in 1881.

For the United Provinces of Agra and Oudh, U. P. Act III of 1899 (U. P. Court of Wards Act). Under s. 24 the Court of Wards *may* appoint, control, and remove guardians of person of minors in certain circumstances, but it shall be guided by the provisions of s. 17 of the G.W.A.

For Central Provinces, the Central Provinces Court of Wards Act, XXIV of 1899.

For the Panjab, Panjab Act II of 1903, which applies with certain modifications to the North-West Frontier Province.

For Madras, Madras Act I of 1902.

As regards Bombay, Bombay Act I of 1905.

As to the bearing of clause (*a*) on the Muhammadan Law respecting the custody of a child-wife, see under s. 110, *post*.

106. In the case of a minor who is not a European British subject, nothing in the Guardians and Wards Act, 1890, is to be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject.

Saving of power of appointment under the personal law.

G.W.A. 6. It will be shown hereafter that the Muhammadan Law recognises the power of a father to appoint by will a guardian of the property of his minor children, and of their persons after a certain age.

PROVISIONS OF THE MUHAMMADAN LAW AS TO WHO ARE GUARDIANS OF THE PERSON OF A MINOR.

Order of priority among females.

107. [1]According to the Muhammadan Law, to which on this point the Courts are bound to have regard, the custody (*hizanat*) of a boy until he has completed his seventh year, and of a girl under the age of puberty (at all events as against anyone but a husband[2]) belongs to—

(1) The mother, if alive and not disqualified on any of the grounds hereinafter mentioned; failing her, to the

(2) Mother's mother, h.h.s.;

(3) Father's mother, father's mother's mother, or father's father's mother, h.h.s.;[3]

(4) Full sister (or sisters jointly ?);

(5) Uterine sister;

(6) *Perhaps* consanguine sister;

(7) Full sister's daughter;

(8) Uterine sister's daughter;

(9) *Perhaps* consanguine sister's daughter;

(10) Maternal aunt, h.h.s., with preference to the full blood over the uterine, and to the uterine over the consanguine;

(11) Paternal aunt, h.h.s., with similar preference.

[1] Baillie, 431; Hed. 138, where two interesting traditions are recorded. One is more specially connected with the next section; the other may be conveniently quoted here.

"A mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child; and Siddeek (*i.e.* Abu Bakr, the first Caliph) alluded to this, when he addressed Omar on a similar occasion, saying, 'The spittle of the mother is better for thy child than honey, O Omar!' which was said at a time when a separation had taken place between Omar and his wife, the mother of Assim, the latter being then an infant at the breast, and Omar desirous of taking him from the mother; and these words were spoken in the presence of many of the Companions, none of whom contradicted him."

The recent prevalence among the Arabs of the habit of putting female infants to death, which it is one of the Prophet's chief glories to have suppressed, would supply him with a special motive for insisting earnestly on the mother's right in this matter.

The right of custody thus vested in the mother and other females above mentioned does not involve any obligation of providing maintenance for the children, the burden of which rests exclusively on the father, even to hiring a wet-nurse for infants at the breast. See under s. 49, *ante*.

In *Imambandi* v. *Mutsaddi*, L.R., 45 I. A., App. (1918), 73, the Privy Council, point out that the custody of the person is not guardianship; even the term "*de facto* guardian" is misleading, as connoting the idea of certain powers over an infant's property.

When a child ceases to be a minor under the Muhammadan Law but is a minor under the Indian Majority Act, 1875, *i.e.* generally under the age of 18 years, a person who would be guardian under the general law can apply for custody of the minor under s. 25 of the Guardians and Wards Act (VIII of 1890), though the minor had never been in his custody and had all along been in the custody of another person: *Ibrahim Nachi*, 39 Mad., 608 (1915).

[2] In *Bhoocha* v. *Elahi Bux*, 11 Cal., 574 (1885), a grandmother was held to be entitled, in preference to a paternal uncle, to the guardianship of a girl under the age of puberty, who had been contracted in marriage by the uncle, but who would have had the option of cancelling the marriage on attaining puberty, and whose husband, being also under the age of puberty, made no claim. The decision would, it is submitted, have been the same had the case arisen subsequently to the passing of Act VIII of 1890. [See under s. 103.]

[3] The expression used is simply "father's mother, how high soever;" but the intention is, no doubt, to prefer the female line at every step in the ascending pedigree, as is more distinctly shown in the Shafeite treatise, Minhaj at Talibin, iii, 97.

108. A woman otherwise entitled to the custody of a boy or girl is disqualified— Females when disqualified.

(1) By being married to a man not related to the minor within the prohibited degrees, so long as the marriage subsists;[1]

(2) By going to reside at a distance from the father's place of residence—except that a divorced wife may take her own children to her own birth-place, provided it be also the place at which the marriage was contracted;[2]

(3) By failing to take proper care of the child;

(4) By gross and open immorality.[3]

[1] Baillie, 432; Hed. 138; *Beedhun*, 20 W. R., 411 (1873); *Fuseehun* v. *Kajo*, 10 Cal., 15 (1883); *Bhoocha* v. *Elahi Bux* (*ubi sup.*). The tradition recorded in the Hedaya is that a woman once applied to the Prophet, saying, "O Prophet of God! this is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own care." To which the Prophet replied, "Thou hast a right in the child prior to that of thy husband, *so long as thou dost not intermarry with a stranger*."

[2] Baillie, 435; Hed. 139. The Muhammadan Law lays down the further condition that the child must not be taken into the Dar-ul-Harb (countries hostile to the law of Islam); but according to one view persons residing in British India are already in Dar-ul-Harb, and even according to an alternative opinion, namely, that it is a neutral country, neither Dar-ul-Islam nor Dar-ul-Harb, it may be doubted whether the spirit of the rule would be violated by

a child being taken to, say, England or France, where the religion of Islam can be freely professed, though no part of its system is enforced by the Courts. The better opinion seems to be that British (and possibly protected) India is Dar-ul-Islam.*

[3] *Abasi* v. *Dunne*, 1 All., 598 (1879); Baillie, 431. "The wickedness which disqualifies a mother for the custody of her child is such as may be injurious to it, as *Zina*, or theft, or the being a professional singer or mourner. And a person is not worthy to be trusted who is continually going out and leaving her child hungry." In the same passage it is said that apostasy is also a disqualification, "whether she have joined the Dar-ool-Harb or not, *because she is kept in prison till she returns to the faith;* " but (as Mr. Baillie remarks) this reason does not apply in British India, and, on the other hand, it is expressly stated in Hed. 139 that a female infidel married to a Mussulman is entitled to the custody of her child "so long as the latter is incapable of forming any judgment with respect to religion, and whilst there is no apprehension of his imbibing an attachment to infidelity," and this danger could not arise any earlier under an apostate than under an infidel born and bred. Act XXI of 1850 would not of itself be conclusive on the point, as it is not simply a question of forfeiture of rights, but partly of fitness or unfitness for duties. *Cf.* s. 95.

Male paternal relatives.

109. Failing all the female relatives above mentioned, the custody of such minors as aforesaid belongs to [the father, and failing him to] the nearest male paternal relative within the prohibited degrees, reckoning proximity in the same order as for inheritance.

Hed. 138. The father is not mentioned specifically as one would expect, but it seems more likely that he is meant to be counted as the nearest male paternal relative than that he is intentionally excluded from the care of his own infant children in favour of his own father, son, or brother. That place is expressly assigned to him by the Egyptian Code, Art. 385.

The reason assigned for not carrying the series beyond the prohibited degrees is, fear of treachery. The fear was, I suppose, in the case of a girl that the paternal cousin or other agnate would forcibly marry her to himself, which he could the more easily do by reason of his being also guardian for marriage (see s. 93), and in the case of a boy that he would be murdered for the sake of his inheritance; whereas a brother or uncle could not do the former, and would be restrained by natural affection (so it must have been assumed) from the latter.

Custody of married minor.

110. So far as Muhammadan Law is concerned, the balance of modern authority is in favour of the view that according to that law the mother of a girl who is married, but has not attained puberty, is entitled to the custody of her as against the husband.[1] But the bearing of s. 19 (*a*) of the Guar-

* Mr. Abdur Rahim, Muh. Jur., p. 397, speaks of India as Dar-ul-Islam. This was practically settled by competent Fatwas in the Wahabi controversy. If it were not so, the practice of certain religious rites by Moslems in India would not be lawful. But the spirit of the Wahabi controversy has now (1920) been revived by the Khilafat controversy, and there would now be a volume of Muslim opinion in favour of holding India to be Dar-ul-Harb. But such a view can hardly be entertained by an Anglo-Indian Court.

dians and Wards Act, 1890 (s. 105 (*a*) of this Digest), has not yet been considered by the Court.[2]

[1] *Khatija Bibi*, 5 B. L. R., 557 (1866); *Wazeer Ali* v. *Kaim Ali*, 5 N. W., 196 (1873); *Nur Kadir* v. *Zuleikha Bibi*, 11 Cal., 649 (1885); *Korban* v. *King-Emperor*, 32 Cal., 444 (1904). In the one decision on the other side, *Mahin Bibi*, 13 B. L. R., 160 (1874), there was the special circumstance that the custody of the mother would have been virtually the custody of the father, who had apostatised from the Muhammadan religion. See under s. 95.

[2] All the above cases, except *Korban* v. *King-Emperor*, were decided before the passing of the Guardians and Wards Act, 1890, and in the last-mentioned case there was no question of the Court declaring the mother to be guardian of the girl's person, but merely of sustaining or quashing her conviction on the criminal charge of kidnapping from the lawful custody of the husband. It is clear that the mother cannot obtain an order under the Act declaring her to be the guardian of her daughter's person, unless she can satisfy the Court that the husband is unfit to be guardian. But it seems open to argument (*a*) whether the mere fact of the girl's immaturity will not justify the Court in holding the husband to be an unfit guardian; (*b*) whether the Court cannot protect the mother's actual custody of the child-wife (subject, it may be, to the right of the husband to direct her education) without declaring her to be a guardian under the Act; and lastly, (*c*) whether, in such a case as that of *Zuleikha Bibi*, a girl whose marriage has not been consummated, and is liable to be cancelled by the exercise of her "option of puberty," is a "married female" within the meaning of the Act.

Custody of boy over seven, and adult female.

111. The custody of a boy over seven years of age, and of an unmarried girl who has attained puberty, belongs to—

(1) The father;

(2) The "executor" appointed by the father's will, at all events if the care of the person as well as of the property has been expressly conferred upon him;

(3) The father's father, h.h.s.

(4) The male paternal relatives in the same order as for inheritance:

Provided that no relative is entitled to the custody of an unmarried girl who is not too nearly related to marry her.

Failing all these, it is for the Court to appoint a guardian of such minors.

Baillie, at p. 433, gives in effect the above order with the omission of (2); but this omission is supplied at p. 665, where an executor is defined to be "an *ameen*, or trustee, appointed to superintend, protect, and take care of, his property *and children*, after his death." See also the quotation from the Sharh-i-Viqaya in Macn. p. 310. "He to whom the father has entrusted the disposal of his family and fortune is his executor."

The right of the father to take boys above seven years of age out of the custody of the mother was affirmed in *Idu* v. *Amiran*, 8 All., 322 (1886). This right was, however, expressly declared to be subject to the principle that there must be no reason to apprehend that by being in such custody the children would run the risk of bodily injury; and the Court declined to say that bodily injury was the only consideration that would warrant the refusal of an application for the custody of a minor. Such a question would now be raised by application for removal under s. 39 of the G.W.A. (=s. 133 of this Digest). According to the Mishcat-ul-Masabih, ii. 546 (M.Y. vol. i, p. 140), the Prophet permitted a son (over seven ?) to elect whether he would live with his father or his mother; * and see *In the matter of Ameeroonissa*, 11 W. R., 297 (1869).

GUARDIANS OF THE PROPERTY OF A MINOR ACCORDING TO MUHAMMADAN LAW.

Guardians of property.

112. The guardians of a minor's property are—

(1) The father;

(2) The person, if any, appointed by the father's will, either specially as such, or generally as executor;

(3) The executor of such executor, if any;

(4) The father's father;

(5) The executor of the last-named, if any;

(6) His executor.

Failing all of these, it is for the kazi, according to Muhammadan Law, and therefore now for the Court, to appoint a guardian or guardians.

Baillie, 677; Macn. p. 304. The singular statement quoted by the law-officer in the latter passage from the Viqaya, that after the magistrate comes the *magistrate's executor*, is explained to mean merely that any person whom the Government may choose to appoint is a legal guardian.

The principle that blood-relations as such, other than the father or paternal grandfather, have nothing to do with the property of a Muhammadan minor, has often been affirmed by the Courts. See, for instance, as to an elder brother, *Bukshan*, 3 B. L. R. (A. C.), 423 (1869); as to an uncle, *Nizam-ud-din Shah*, 18 All., 373 (1896); *Alimullah Khan*, 29 All., 10 (1906); *Abdul Khader*, 32 Mad., 276 (1908); as to the mother, *Sita Ram*, 8 All., 324 (1886); *Baba* v. *Shivappa*, 20 Bom., 199 (1895); *Moyna Bibi*, 29 Cal., 473 (1902); as to brothers, *Mata Din*, 34 All., 213 (1911), and L. R., 39 I. A., 49; mother and two brothers, *Bhutnath Dey*, 11 Cal., 417 (1885); *Durgozi Row* v. *Fakeer Sahib*, 30 Mad., 197 (1906).

On the other hand, the High Court of Allahabad has in two cases upheld a sale of the property of minors by the female relative who was legal guardian of their persons and *de facto* manager of their properties, where the sale was for the purpose of paying off ancestral debts, and was made in good faith and

* "A woman came to the Prophet, and said: 'My husband wants to take away my son; and now he is arrived at that age from which I am benefited.' The Prophet said to the boy: 'This is your father, and this is your mother, take which you like;' and the boy took hold of his mother's hand, and she took him away."

for adequate considerations; *Hasan Ali*, 1 All., 533 (1877); *Majidan* v. *Ram Narain*, 26 All., 22 (1903); and the High Court of Calcutta took the same view in *Mafazzal Hossein*, 34 Cal., 36, and in *Ram Charan Sanyal*, 34 Cal., 65 (1906). Apparently the sale of a minor's property by his mother, though she is not his natural guardian by Muhammadan law, would be valid if it were shown to be for his benefit or advantage: *Sheikh Rajab Ali* v. *Sheikh Wazir Ali*, 1 Patna L. J., 188 (1916). Similarly, a mother, being the *de facto* guardian of a Muhammadan minor, is competent, in case of necessity and for the minor's benefit, to make a valid mortgage of the minor's property: *Abid Ali*, 38 All., 92 (1915).

So far as voluntary alienations are concerned, the Madras High Court (in Full Bench) have dissented from the Allahabad ruling in *Hasan Ali's* case referred to above, and have overruled their own decision in *Pathummabi*, 26 Mad., 734 (1902): *Abdul Majeeth*, 40 Mad., 243 (1915). In their view a co-heir, in possession, of a deceased Muhammadan, cannot bind the other co-heirs or creditors even if the sale was for discharging the debts of the deceased; but the question whether a decree in such cases against one co-heir would bind the other co-heirs was expressly left open. See also *Ummi Begam*, 30 All., 462 (1908), where the sale was by the mother of a lunatic. *Husein Begam*, 6 Bom., 467 (1882), was a very peculiar case, in which the Court, while not disputing the general rule that an elder brother is not empowered as such to sell the property of his minor brother, nevertheless held the defect to have been cured in the case in question by the sanction of the ruling Power, given through the local agent of the Governor of the Bombay Presidency.

A woman is not disqualified for the office of executor; Baillie, 669.

THE GENERAL LAW OF INDIA WITH RESPECT TO THE DUTIES, RIGHTS, AND LIABILITIES OF GUARDIANS.

Guardians in general Fiduciary relation to ward.

113. (1) A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.

(2) The fiduciary relation of a guardian to his ward extends to, and affects, purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.

G.W.A. 20. It should be noted that this section is not limited to guardians appointed or declared under the Act. Consequently it supersedes all rules of Muhammadan Law, if any, which may be construed as authorising a guardian of the property of a minor (*wasi*) to make a profit out of his office, save as provided by the instrument appointing him or by this Act. As to remuneration for his trouble, see s. 115, *post*, and commentary. As regards making a profit by selling the orphan's property to himself, or his own to the orphan, all the Hanafi authorities agree in anticipating the statutory prohibition by declaring such sales unlawful when not obviously for the benefit of the orphan; while

Muhammad, and perhaps Abu Yusuf, pronounce them unlawful under all circumstances. See Baillie, 681. It is true that in an earlier sentence of the same paragraph (p. 680) we read that "if an executor should pledge the property of an orphan for his own debt, the pledge ought not by analogy to be lawful, but it is so on a liberal construction of law," and this looks at first sight very much like making a profit out of his office, especially as, according to English notions, a pledge would be very likely to lead to a sale of the goods by the creditor. But the next sentence shows that this was not intended. "It is not lawful for the executor to pay his own debt with property of the orphan. He may, however, sell the orphan's property in exchange for his own debt to his creditor, according to Aboo Huneefa and Moohummud, and the price becomes a set-off against his debt; but he is responsible to the minor." And further light is thrown upon the matter by the corresponding passage in the Hedaya (p. 638), which is substantially to the effect that such a transaction may sometimes be beneficial to the ward, who acquires an absolute right of action against the *wasi* for the value of the goods if they are lost in the hands of the pawnee (no matter by whose fault), or taken by the pawnee in satisfaction of the *wasi's* debt, whereas they might otherwise be lost in the hands of the *wasi* in such a way that the latter could not be held responsible.

So far, then, there is no real conflict between the Act and the Muhammadan Law, even assuming the correct interpretation of that law to be as above stated, which, according to the Hedaya, was not undisputed. The underlying principle is the same in both laws, that the guardian, or executor must do his best for the minor and not for himself; and the transactions contemplated are valid by both laws if, and only if, they are considered to satisfy that principle under existing social conditions. But a question of greater difficulty is raised by certain dicta of the Muhammadan lawyers which appear to allow the father, in the rare case of his infant children possessing property in his lifetime, a larger power over that property than an ordinary guardian would have. "If a father pawn the goods of his infant child into his own hands for a debt due from the child, or into the hands of another of his children being an infant, or of his slave, being a merchant and not in debt, it is lawful; because a father, on account of the tender affection which he is naturally supposed to have for his child, is considered in a double capacity, and his bare inclination as equivalent to the assent of both parties; *in the same manner as where a father sells the property of an infant child to himself*" (Hed. 639). Further on it is stated that an ordinary guardian may retain the minor's goods as security for the price of necessaries purchased by him for the minor (which is a matter of course, since clearly he might sell the goods outright if the necessaries could not otherwise be provided), but not as security for any other debt. Ameer Ali tells us (M. L. Vol.i, 479) that "other jurists" seem to disagree with the Hedaya, and refers to the Durr-ul-Mukhtar and the Jama-ush-Shittât; but even if the Muhammadan Law be really as stated in the Hedaya, these anomalous privileges of the father seem to be tacitly abrogated by the Act, he being a "guardian" by the definition, whether appointed or declared as such or not, and the giving a preference to himself over other creditors of the ward being no more compatible with the fiduciary relation in his case than in the case of any other guardian.

Capacity of minors to act as guardians.

114. A minor is incompetent to act as guardian of any minor except his own wife or child.

G.W.A. 21, omitting an exception which refers only to Hindus. The Muhammadan Law appears to be the same (Baillie, 669). The word "guardian" in this section includes guardianship both of person and property: *Ibrahim Nachi*, 39 Mad., 608 (1915).

115. (1) A guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties. Remuneration.

(2) When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fees shall be paid to the Government out of the property of the ward as the Local Government, by general or special order, directs.

G.W.A. 22.

As to the Muhammadan Law, see Ameer Ali, M. L. vol. i, p. 571. "A gratuitous executor cannot be compelled to administer to the estate of the testator, and the kazi, therefore, has the power to fix an allowance for him. The Fatwa is in accordance with this. In the Kazi Khan, however, it is stated that where no allowance is fixed for the executor, he can take a limited and reasonable sum for his remuneration 'to the extent of his necessity;' and, if there is any need for it, he can make use of the infant's conveyances in going to and fro on the work of the infant, though several jurists hold that this would not be valid."

In Mahomed Yusoof's Mah. Law, vol. i, p. 137, the following tradition is cited from the Mishcat-ul-Masabih. "Amer-Ibn-Shuaib relates from his forefathers, that 'a man came to His Majesty and said, "Verily I am a poor man, and do not possess anything; and I have an orphan that I nourish, and he has money." His Highness said, "Eat of the orphan's money, so long as you do not lavish it away, or take before or more than you want, or accumulate from it."'" But this leaves open the question, whether a person so situated is entitled to help himself to remuneration without applying to the kazi as the man in the story applied to the Prophet. And perhaps the same may be said of the original Koranic precept (K. iv. 6), "Let him who is rich abstain entirely [from the orphans' estates]; and let him who is poor take thereof as shall be reasonable." Even supposing the affirmative to be the correct answer according to Muhammadan Law, it seems to be superseded by the statutory law, which forbids any "guardian," whether appointed or declared by the Court or not, to make a profit out of his office, unless expressly authorised to do so, and, on the other hand, empowers the Court to fix an allowance for him as the kazi might have done under Muhammadan Law.

116. A Collector appointed or declared by the Court to be guardian of the person or property, or both, of a minor shall, in all matters connected with the guardianship of his ward, be subject to the control of the Local Government or of such authority as that Government, by notification in the official Gazette, appoints in this behalf. Control of Collector as guardian.

G.W.A. 23. The Collector so appointed might be called, in the quaint phrase of the Viqaya (under s. 112, *ante*), "the magistrate's executor."

Duties of guardians of the person.

117. A guardian of the person of a ward is charged with the custody of the ward, and must look to his support, health, and education, and such other matters as the law to which the ward is subject requires.

G.W.A. s. 24.

The concluding general words can hardly be stretched so as to make it the right or duty of the appointed " guardian of the person," not being the proper " guardian for marriage," according to Muhammadan Law, to negotiate a marriage for the ward ; and it has even been doubted whether, as read with s. 43 of the Act, they give jurisdiction to the Court which appointed the former to order him or her to give up the ward to the latter for the purpose of marriage ; (*Bai*) *Dewali*, 22 Bom., 509 (1896). But see Trevelyan, Hindu Family Law, p. 44. Some such power must reside somewhere. Perhaps it is best to say that the *power* resides in the guardian of the person, this being a matter to which he must give his attention, but that the negotiation of a marriage is not, under the Act, one of his " duties " or " rights."

Sections 118, 119, 120 *of the 2nd edition, corresponding respectively with sections* 25 (1) *and* (2), 25 (3), *and* 26 *of the Guardians and Wards Act, and dealing with the enforcement of the guardian's right to the custody of his ward's person, were omitted in the 3rd edition in order to make room for fresh matter ; but the old numbering was and is retained.*

Differences among guardians to be referred to the Court.

121. Where there are more guardians than one of a ward, and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting such matter in difference as it thinks fit.

G.W.A. 43 (2). From this section, and from the silence of the Act as to any power of one of two guardians to act without the other, it may be inferred that there is no such power, and that the validity of every act of a co-guardian depends upon the concurrence, express or implied, of the other or others, unless there is anything to the contrary in the personal law of the parties, or in the will or other instrument appointing the guardians. That this is also the *general* rule of Muhammadan Law appears from Baillie, 669, 670, where, however, certain exceptions are mentioned, in a passage taken partly from the Hedaya and partly from the Fatawa Alamgiri.

" One may act separately as to the washing and shrouding of the deceased's body and its removal to the grave (including, as stated in a footnote, the purchase of the shroud and the hiring of bearers) ; the payment of debts out of assets of the same kind as the debts ; the restoration of deposits or of things usurped by the deceased, or acquired under defective sales ; [the manumission of a specific slave] and the general preservation of his property. But they cannot act singly in taking possession of deposits belonging to him, nor in receiving payments of debts due to him, though they may in suing for his rights. They may also act separately in accepting a gift for a minor, sanctioning his acts, making partition of things weighable or measurable, and selling what is liable to spoil. When the deceased has directed such and such parts of his property to be bestowed in charity, on beggars and indigent persons, without specifying them, one executor cannot act separately from the other, according to Aboo

Huneefa and Moohummud, though he may do so according to Aboo Yusuf: and if the objects of the charity are specified, he may act alone according to them all."

Possibly a Civil Court might still feel bound to take account of these exceptions as between Muhammadan joint guardians; but the above section indicates clearly the proper course in case of disagreement, except where the matter admits of no delay.

122. A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this chapter, he may do all acts which are reasonable and proper for the realisation, protection, or benefit of the property.

Duties of guardian of property.

G.W.A. 27. *E.g.* he can bind the minor by either exercising or refusing to exercise a right of pre-emption; *Lal Bahadur Singh*, 3 All., 437 (1881); *Umrao Singh*, 23 All., 129 (1901).

123. Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange, or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian, and the Court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

Powers of testamentary guardians.

G.W.A. 28. As already observed, p. 184 above, this provision supplies a powerful inducement to Muhammadan *wasis* to place themselves under the Act.

124. Where a person other than the Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court—

Limitation of powers of guardian appointed or declared by the Court.

(*a*) Mortgage or charge, or transfer by sale, gift, exchange, or otherwise, any part of the immovable property of his ward, or

(*b*) Lease any part of that property for a term exceeding five years, or for any term extending more than one

year beyond the date on which the ward will cease to be a minor.

G.W.A. 29.

The rule of law that, there being no mutuality in a contract to which a minor was a party, it could not be enforced by him, does not apply to a contract for the sale of immovable property entered into by the certificated guardian of a minor with the sanction of the Court; such a contract is valid and a suit for damages for breach of the contract will lie on behalf of the minor; *Babu Ram*, 35 All. 499 (1913).

Voidability of unauthorised transfers.

125. A disposal of immovable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.

G.W.A. 30. For the Muhammadan Law on the subject of this and the two foregoing sections, see Baillie, 676, from which it would appear that according to all authorities the executor (or guardian) has power to sell movable property of a minor, but that according to "the moderns" he can only sell the immovable property, "if the minor has occasion for the price of it, or the purchaser is eager to obtain it by giving double its value, or the sale is otherwise for the minor's advantage, as, for instance, when the *kharaj* (land tax) and expenses exceed its income; or the property, being shops or a mansion, is falling into decay."

See also Macnaghten, p. 64, where seven circumstances which may justify a sale are enumerated. The British Courts have so far been content to lay down broadly that, in order to authorise a sale by the guardian of a Muhammadan minor, there must be an absolute necessity for the sale, or else it must be for the benefit of the minor. See *Hurbai*, 20 Bom. 116 (1895), at p. 121. That was, as it happened, a case of mortgage, and the Court pointed out that the Muhammadan Law makes no provision for mortgages, such transactions being, owing to the payment of interest, unlawful; but it held that, as mortgages do now exist among Muhammadans, they must be dealt with on the same principle as sales.

As to guardians selling land to which the title of the minor is disputed, in order to avoid litigation, see *Kali Dutt Jha*, 16 Cal., 627 (1888).

As to movable property, on the other hand, the Muhammadan Law expressly requires that it shall not be idly hoarded, but profitably invested. According to a trad tion preserved in the Mishcat-ul-Masabih, the Prophet said, in one of his public preachings: "Beware! whoever is guardian to an orphan who has money, he must trade with it; and not leave it without trading, so that the alms * may not eat up its † property." But according to the Hanafi lawyers the reason assigned will not hold, *zakat* not being incumbent upon

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* *Zakat*, more properly the tax for the benefit of the poor; compulsory in the sense that non-payment was understood to entail grievous torment in the next world, and in a purely Muhammadan State, the consequences of not meeting the tax-gatherer's demands; but voluntary in the sense that the proprietor had an option as regards certain kinds of property, whether he should pay his contribution as a tax to the state, or disburse it direct to the poor, who are its beneficiaries (See Aghindes, Theories, etc., pp. 298—299). In a non-Moslem State, its disbursement to the poor is considered a compulsory religious duty, but in no circumstances is it collected by the State.

† *Sic* in Captain Matthew's translation, meaning, no doubt, the orphan child's property.

infants, because it is an act of piety, requiring an exercise of free will of which infants are not capable. See Hed. I.

The whole law of guardians and their powers as regards dispositions of property under Muhammadan Law was reviewed by the Privy Council in *Imambandi* v. *Mutsaddi* (1918), L. R., 45 Ind. App. 73, at pp. 83—93. In particular their Lordships laid emphasis on the sharp distinction which Muhammadan Law recognises, in dealing with the powers of guardians, between movable (*mata'*) and immovable property (*a'kar*). They disapproved of the Madras ruling: *Ayderman Kutti* v. *Syed Ali* (1914), 37 Mad., 514.

There is a difference between the position and powers of a guardian and those of his manager; but neither is competent to bind the minor or the minor's estate by a contract for the purchase of immovable property; the minor, therefore, for want of mutuality, cannot, on attaining his majority, obtain specific performance of such a contract: *Mir Sarwarjan*, L. R., 39 I. A., 1 (1911).

126. Permission to the guardian to do any of the acts mentioned in s. 124 (s. 29 of the Act) shall not be granted by the Court except in case of necessity, or for an evident advantage to the ward; and the Court may in its discretion attach to the permission the following among other conditions, namely:—

Practice as to permitting transfers.

(*a*) That a sale shall not be completed without the sanction of the Court;

(*b*) That a sale shall be made to the highest bidder by public auction, before the Court or some person specially appointed by the Court for that purpose, at a time and place to be specified by the Court, after such proclamation of the intended sale as the Court, subject to any rules made under this Act by the High Court, directs;

(*c*) That a lease shall not be made in consideration of a premium, or shall be made for such term of years, and subject to such rents and covenants as the Court directs;

(*d*) That the whole or any part of the proceeds of the act permitted shall be paid into the Court by the guardian, to be disbursed therefrom or to be invested by the Court in prescribed securities, or to be otherwise disposed of as the Court directs.

G.W.A. 31, (1) and (3).

I do not find that the Muhammadan Law makes any provision for acts of this class to be done with the sanction of the Court which could not be done

without it; except that in the chapter of the Hedaya on the "Duties of the Kazee," Book XX, chap. iii, p. 343, it is said that the Kazi may, but that an executor may not, lend the property of orphans.

Variation of powers by the Court.

127. Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, the Court may, from time to time, by order define, restrict, or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward *and consistent with the law to which the ward is subject.*

G. W. A. 32.

Guardian may apply to the Court for its opinion.

128. A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him for its opinion, advice, or direction on any present question respecting the management or administration of the property of his ward.

G.W.A. 33 (1). This sub-clause is almost identical with s. 34 of the Trusts Act, 1882, only substituting "guardian appointed or declared by the Court" for "trustee." That section in its turn reproduces in a slightly shortened form what was s. 43 of Act XXVIII of 1866, which was taken almost verbatim from the English Act, 22 & 23 Vict. c. 35, s. 30. It was necessary to repeat the provision, because a guardian of property under this Act is not as such a "trustee" as the term is defined in the Trusts Act, not having the legal ownership of the property; though if, as usually happens with Muhammadans, the guardian of an orphan's property is such in virtue of being the father's executor, the ownership will vest in him in the latter capacity by virtue of s. 4 of the Probate and Administration Act, 1881 (see ss. 175 and 164 of this Digest), and as there is certainly an obligation annexed to his ownership, "arising out of a confidence reposed in and accepted by him," he will become a trustee by definition.

Sections 129, 130, 131, *and* 131*a*, *corresponding with G.W.A.* 34, 35, 36, 37, *and enumerating certain duties of a guardian of property and prescribing the procedure for their enforcement, are omitted in this edition.*

THE GENERAL LAW OF INDIA WITH RESPECT TO THE TERMINATION OF GUARDIANSHIP.

Right of survivorship.

132. On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.

G.W.A. 38. From a passage in Baillie's Digest, p. 671, it would seem that by Muhammadan Law the survivor cannot, until expressly authorised by

the Court to act alone, do anything which he could not have done separately in the lifetime of his colleague. As to what acts come within this category, the Hanafi authorities are not agreed, and this section relieves the Courts from the duty of determining which to follow. It also renders superfluous the Muhammadan rule that one of two executors may, by making the other his executor, constitute him sole executor of the original testator, and therefore sole guardian of the property of the latter's minor children.

133. The Court may, on the application of any person interested, or of his own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely :— Removal of guardian.

(*a*) For abuse of his trust ;

(*b*) For continued failure to perform the duties of his trust ;

(*c*) For incapacity to perform the duties of his trust ;

(*d*) For ill-treatment, or neglect to take proper care, of his ward ;

(*e*) For contumacious disregard of any provision of the Guardians and Wards Act, or of any order of the Court ;

(*f*) For conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward ;

(*g*) For having an interest adverse to the faithful performance of his duties ;

(*h*) For ceasing to reside within the local limits of the jurisdiction of the Court ;

(*i*) In the case of a guardian of the property, for bankruptcy or insolvency ;

(*j*) By reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject :

Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed—

(*a*) For the cause mentioned in clause (*g*) unless the adverse interest accrued after death of the person who appointed him, or it is shown that that person made

and maintained the appointment in ignorance of the existence of the adverse interest; or

(*b*) For the cause mentioned in clause (*h*) unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.

G.W.A. 39. The provisions of this section are far more full and precise than those given in Hed. 698, and Baillie, 669; but the only point in which there is any approach to actual conflict is that for simple incapacity unaccompanied by misconduct the Muhammadan lawyers recommend the kazi not to remove the *wasi*, but to associate another with him. Even here the conflict is not irreconcilable, because this section merely says that the Court *may* (not *must*) remove a guardian for (among other reasons) incapacity to perform the duties of his trust, and, on the other hand, the Hedaya merely recommends the less drastic alternative where the *wasi* is "unequal to the office," and approves of his being superseded if he is found on inquiry to be "utterly incapable," and himself desires to be released.

As to clause (*j*), it should be remembered that by Muhammadan Law the functions of the mother as guardian of the person of her child cease, in the case of a boy, at the age of seven, and in the case of a girl, at puberty, and cease at once on her marrying another husband, and in some other contingencies (ss. 108 and 111).

Discharge.

134. (1) If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.

(2) If the Court finds that there is sufficient reason for the application it shall discharge him; and if the guardian making the application is the Collector, and the Local Government approves of his applying to be discharged, the Court shall, in any case, discharge him.

G.W.A. 40. Compare Baillie, 667. "Kurukhee has said that when an executor has accepted, or has, after the death of the testator, disposed of any part of his property, and then wishes to relieve himself of his office, he cannot lawfully do so, except in presence of the *hakim*, or judge. And when he appears before the judge with this view the judge ought not to relieve him without considering whether he is competent to the proper discharge of his functions, and ought to relieve him only if he believes him to be unfit or overburdened with business." Here, as elsewhere, the word translated "executor" includes the guardian, whether testamentary or judicially appointed, of the property of a minor.

Cessation of authority of guardian of the person.

135. The powers of a guardian of the person cease—

(*a*) By his death, removal, or discharge;

(*b*) By the Court of Wards assuming superintendence of the person of the ward ;

(*c*) By the ward ceasing to be a minor ;

(*d*) In the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person, or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit ; or

(*e*) In the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so, or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.

G.W.A. 41 (1). As to clause (*c*), see s. 137, *post*, and as to clause (*d*), see note 2 to s. 110, *ante*. The second branch of clause (*d*) may seem superfluous, as the question of unfitness must be determined by the Court, whether the guardian was or was not appointed or declared by the Court ; but perhaps the distinction intended is that the powers of a guardian who has not received judicial recognition are to cease *ipso facto*, on the marriage of his ward, unless and until someone moves the Court to declare the husband unfit, whereas the guardian appointed or declared by the Court will retain his office until the girl's husband comes forward to claim her custody and satisfies the Court of his fitness.

Of a guardian of property.

136. The powers of a guardian of property cease—

(*a*) By his death, removal, or discharge ;

(*b*) By the Court of Wards assuming superintendence of the property of the ward ; or

(*c*) By the ward ceasing to be a minor.

G.W.A. 41 (2). For clause (*c*) see s. 137 below.

Age of majority.

137. (1) Every minor of whose person or property, or both, a guardian (other than a guardian for a suit), has been appointed by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been assumed by any Court of Wards before the minor has attained that age, is deemed to have attained his majority when he has completed his age of twenty-one years, and not before.

(2) Every other person domiciled in British India is deemed to have attained his majority when he has completed his age of eighteen years, and not before.[1] But—

(3) These rules do not affect the capacity of any Muhammadan to act [either as guardian or as principal] in respect of marriage, dower, or divorce.[2]

[1] The Indian Majority Act, 1875, s. 3, as amended by s. 52 of the G.W.A., and slightly shortened.

The Muhammadan Law which these provisions supersede, except as to the matters mentioned in sub-s. (3), may be summed up generally, but not with entire accuracy, in the statement already quoted from the translator of the Hedaya,* that "puberty and majority are, in the Mussulman Law, one and the same." It is subject to this qualification, that a youth who has attained puberty might still, under that law, be "inhibited" from dealing with his property if the kazi considered him to be lacking in discretion. According to Abu Hanifa, his property must in any case be delivered to him on his attaining twenty-five, and the fixing of this particular age has been pointed to by Von Kremer as an unmistakable trace of the influence of Roman Law, though the reason assigned is certainly more Arabian than Roman, *viz.*, that the withholding of the property is intended to operate as instruction or discipline, and a person after that age will not be disposed to receive instruction, "*since it frequently happens that a man arrived at those years is a grandfather, his son having a son born to him.*"† The two disciples considered that there was no magic in the number twenty-five, and that a person who was "prodigal" at the age of puberty should not have his property delivered to him at any age, until his discretion be fully known (Hed. 527).

For purposes of the Indian Penal Code (Act XLV of 1860), s. 363 (kidnapping), the age of minority of a Muhammadan is determined by s. 3 of the Indian Majority Act, 1875, and not by Muhammadan Law: *Re Muthu Ibrahim*, 37 Mad., 567 (1914).

[2] S. 2 of the Indian Majority Act. The words in brackets are not in the Act, but are clearly implied, and are inserted here in order to direct attention to the fact that the Muhammadan Law differs from the statutory law not only as regards the age at which a person may contract himself or herself in marriage, but also as regards the age at which a person may act as guardian in disposing of another person in marriage. The Fatawa Alamgiri (Baillie, p. 147) says simply that "a minor or an insane person has no power of guardianship," and there is nothing to indicate that "minor" has here any other than the ordinary Muhammadan meaning of a person who is, or is presumed in law to be, physically immature for purposes of marriage. The Madras High Court has held that a Muhammadan wife, not a minor under the Muhammadan Law, but a minor under the Indian Majority Act, in remitting a dower to her husband, is not

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* See under s. 91, *ante*.

† We find mention in the Midrash of a similar Jewish custom at some period not specified:—"A Jew used to marry his son when he was twelve years old to a maiden who had reached the period of puberty; he would marry his grandson when he too was twelve, and thus a man of twenty-six was already a grandfather." See "Jewish Life in the Middle Ages," by Israel Abraham, M.A. (Macmillan & Co., 1896), p. 167 n. Yet, according to Professor de Nauphal, the Muhammadan lawyers treated as an altogether exceptional and astonishing phenomenon the fact recorded by a commentator on Al Bokhari, that Amru Ibn al A'as, the famous conqueror of Egypt, had a son only twelve years younger than himself (*Système Legislatif Musulman, Mariage*, p. 108, *note*).

" acting in the matter of dower " : *Abi Dhuninisa Bibi*, 41 Mad., 1026 (1918) ; but see remarks on the subject in note 1 to s. 47A above.

Sections 138 *and* 139 *of editions previous to the Fourth, corresponding with G.W.A.*, ss. 41 (3), (4), *and* 42, *respectively, and dealing with the procedure on cessation of guardianship, are again omitted in this edition.*

THE GENERAL LAW OF INDIA WITH RESPECT TO SUITS BY OR AGAINST MINORS.

138. The procedure governing such suits is laid down in Schedule I, Ord. XXXII, of the Code of Civil Procedure, Act V of 1908.

Suits by or against minors.

Rule 1 provides that every suit by a minor shall be instituted by the next friend. The Court shall, where the defendant is a minor, appoint for him a guardian for the suit (r. 3). Any person may act as next friend or guardian for the suit, who is of sound mind, has attained his majority [under the general law], and has no interest adverse to the minor's (r. 4).

CHAPTER VI.

MAINTENANCE OF RELATIVES.

Thy Lord hath commanded that ye worship none beside Him, and that ye show kindness unto your parents, whether the one of them, or both of them, attain to old age with thee. Wherefore say not unto them, "Fie on you ? "neither reproach them, but speak respectfully unto them, and submit to behave humbly towards them, out of tender affection, and say "O Lord, have mercy on them both, as they nursed me when I was little." . . . And give unto him that is of kin to you his due.—*Koran*, chap. xvii, 23, 24, 26.

Definitions.

140. The terms explained in this section are to be understood accordingly throughout this chapter.

"Maintenance" includes food, raiment and lodging[1] [suitable to the condition in life of the family.[2]

"Minor," "Adult," and correlative terms, are to be understood with reference to the Indian Majority Act, 1875, not to Muhammadan Law.[3]

"Easy circumstances" mean such an amount of wealth as would render the possessor liable, according to the Muhammadan religion, to pay the *Zakat* (poor rate), and would prevent him from being a proper recipient of alms out of the proceeds of the *Zakat*.[4]

Whenever the question arises in British India, it will apparently be necessary for the Court to take evidence as to the practice of Muhammadans in that particular locality in levying and expending the *Zakat*.

[1] Baillie, 437, from the Durr-ul-Mukhtar. Nothing is said about education or medical attendance. These were not yet specialised in the early ages of Islam. Medical services were free to the poor, and higher education was heavily endowed, and almost entirely free.

[2] When male children are strong enough to work for their livelihood, though not actually adult, the father may set them to work, or hire them out using their wages for their own maintenance; but he has no power to hire females out for work or service. The work must be suitable, not only to the social position of the family, but to the capacity and education of the children. This is indicated by the statement quoted by Baillie (p. 458) from Hulwaee *

* The full designation of this jurist is given by Mahomed Yusoof, in the Tagore Lectures of 1891–92, as "Sheik-ool Imam Shums-ool Ayma Hulwai;" he is also known as Halwáni (flourished about A.D. 1057); he wrote a commentary on the *Mabsūt*, one of the original sources of Hanafi doctrine, having been written by the two disciples of Abu Hanifa himself.

to the effect that sons of the better orders, though physically able-bodied, should not be set to work for their maintenance. Students should not be required to work while engaged in their studies; their right to maintenance from their fathers does not abate while engaged in legal studies (Baillie, 458).

[3] The matters excepted by s. 2 of the Act, *viz.* :—

(*a*) "The capacity of any person to act in Marriage, Dower, Divorce, and Adoption," and

(*b*) "The religion or religious rites and usages of any class of Her Majesty's subjects in India,"

evidently do not include maintenance of relatives.

[4] Baillie, 461; Hed. 148. The statement that the minimum amount (called *nisab*) is "a surplus of 200 dirhems over one's own necessities" must be understood as a rough guide and not in a rigid absolute sense. In the notes to s. 41 above, we estimated the dirhem at a modern equivalent of at least Re. 1-10; so that the *Nisab* of 200 dirhems would be about Rs. 325. As in *Zakat* calculations, this sum must be understood to refer to capital value, for it is liable to *Zakat* "by virtue of its productivity" (Aghnides, 206).

141. With the exception of a wife,[1] no person who is capable of being maintained out of his or her own property is entitled to be maintained at the expense of any other person.[2] All the rules given in this chapter are subject to this proviso.

General proviso.

[1] As to the rights of the wife, see ss. 53 and 55, *ante*.

[2] Baillie, pp. 455, 457, 458 (children), 461 (parents), 463 (other relatives). In the Hedaya, p. 147, it is said that "it is a rule that every person's maintenance must be provided from his own substance, whether he be an infant or an adult."

142. A man must maintain his minor son if and so far as the latter has no sufficient property of his own, and is unable to maintain himself by his own labour; but he may set the boy to work under his own supervision, or hire him out to strangers, and may recoup himself out of the produce of his labour or out of his wages, as the case may be, for whatever has been expended on his maintenance; provided that the work be not beyond his strength, nor unsuitable by reason of his rank or destined profession.[1] The surplus, if any, of the son's earnings must be laid by and handed over to him when he attains his majority.[2]

Maintenance of minor sons.

He is expressly distinguished at p. 7 of vol. ii from "Shamshool Ayma Sarukhsee," who is probably the person described by Ameer Ali (M.L., vol. i, 17) as "*Shams-ul-Aimmah* Abu Bakr Mohammed as Sarakhsi" (circa 1091 A.D.), author of another *Mabsūt* but not to be confused with Razi-ud-din Sarakhsi (circa 1150 A.D.), author of the large *Muhīt* (there is another *Muhīt* by another author). See Aghnides, 178—179.

[1] Baillie, 456—458.

[2] The expression in Baillie is, "until they arrive at puberty," but the Muhammadan principle, that the age of puberty is the age of majority for all purposes (including the management of property unless specially inhibited), is no longer law in British India; and to allow a boy under the age of eighteen to retain or reclaim his own earnings as against his father or other guardian would be contrary to the Indian Majority Act, 1875. See s. 137, and note 3 to s. 140, *ante*.

Of adult sons, when obligatory.

143. A man is not obliged to maintain his adult sons, unless disabled by infirmity or disease.

Baillie, 458.

Of unmarried daughters.

144. A man must maintain his unmarried, widowed, or divorced daughters, whether minor or adult, without reference to their ability to work.

Ib. "A father must maintain his female children absolutely *until they are married*, when they have no property of their own." At p. 463 it is said that "no one shares with a husband the obligation of maintaining a wife." This, however, leaves it uncertain whether widowed and divorced daughters can claim maintenance from the father in the exceptional cases in which they have no property of their own in the shape of dower. But the following passage from the Kazi Khan (p. 843), as translated in M. Y. ii, 329, seems to show that they can, even if their father is not in easy circumstances, *a fortiori* therefore if he is.

"A poor man shall not be compelled to maintain other than four (classes of persons): (i) His minor child; (ii) his daughters who have attained puberty, whether virgin (*i.e.* unmarried) or *syeeba* (married); * (iii) his wife; (iv) his slaves."

The Madras High Court has held that a Muhammadan girl when married passes over to her husband's family and there is no obligation on the members of her natural family to maintain her after her marriage, *even if she is divorced: Pakrichi*, 36 Mad., 385 (1911). But no Muhammadan authorities were considered, and the point at issue was different.

Mother, when liable.

145. In the case of an adult son who is disabled, or of an adult daughter, the mother, if living and in easy circumstances, may be called upon to bear one-third of the charge for maintenance; the father bearing two-thirds.

Hed. 148, where this rule is given as "the doctrine of Khasaf and Hasan," apparently approved by the compiler, though it is acknowledged that according to the Zahir Rawayet the whole burden rests upon the father. The point is not noticed in Baillie's Digest.

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* The word (correctly, *thaiyiba*) means simply one who is not a virgin, and is more commonly applied to a woman who has passed through, but is not actually in, the state of matrimony; the more correct translation would be "widowed or divorced."

In general terms it may be said that the maintenance of a relative within the prohibited degrees rests upon his heirs in proportion to their right of inheritance (Hed., *ib.*), see s. 153 below.

146. The father's obligation to maintain his minor children, and his adult daughters who are destitute and husbandless, is not dependent on his being in easy circumstances. He must maintain them by his labour as long as he can maintain himself.[1] But his and the mother's obligation to maintain a son who is adult but infirm is dependent on easy circumstances, and does not involve any obligation to labour for their benefit.[2]

Extent of father's obligation.

[1] Baillie, 456. "If a man who is in straitened circumstances, and has children, is able to earn anything for their maintenance, it is incumbent on him to do so, and if he refuse he may be imprisoned."* And so in Hed. 340 (last sentence of chap. i of Book XX). So thoroughly is the principle carried out that the maintenance of young children is the business of the father rather than of the mother, that the latter is not even compelled to suckle her own child if the father is in a position to hire a wet-nurse and if the child does not refuse the breast of the stranger (Baillie, 455). Her obligation towards adult children, in the circumstances described in ss. 145 and 147, is simply the general obligation of near relatives in easy circumstances to contribute proportionately towards the maintenance of a destitute person whose inheritance they would share if he were to die rich.

[2] Baillie, 458. "When an *adult male* who is weak or lame, or has both his hands withered so as to be unable to use them, or is insane or paralytic, has property of his own, he is to be maintained out of it; but if he has none, *and his father and mother are in easy circumstances*, the father is bound to maintain him." The reason for mentioning the mother is presumably that, if she were poor, her claim to maintenance as wife would be prior to that of the son; at all events, the passage clearly implies that an adult son, even if infirm and destitute, cannot insist as a matter of right that his father, who has only just enough to maintain himself without working, must go to work in order to maintain him. And so in the Hedaya (p. 148), after stating that the maintenance of relations within the prohibited degrees is not incumbent upon a person in poverty, it is pointed out that "the argument does not hold with respect to a wife or *infant child*."

As to the adult daughter, see the passage quoted above from the Kazi Khan.

A minor son is entitled to sue his father for maintenance even though the father was not entitled to claim the custody of the child and such custody was withheld from him: *Mahomed Jusab*, 37 Bom., 71 (1911). In this case the son was seven years old, and the parties were Cutchi Memons, to whom on this point Muhammadan Law applies. The son's mother had been divorced

* The sentence which follows is interesting. "Though he should be unable to earn anything for their maintenance, the judge is still to decree it against him, and to direct the *mother* to borrow it, and when he is in easier circumstances she may have recourse against him for it." The mother is charged with the duty of borrowing, as being the parent more directly responsible for the children's well-being. Presumably she could borrow out of her own separate property (if she has any) and have recourse to her husband if and when he can pay. *Cf.* s. 149 below.

by the father. But such maintenance should amount only to bare subsistence for the son and not to maintenance according to the condition of the father.

Case of father poor or incapable.

147. Those obligations of the father towards his children which are dependent (as above stated) on his being in easy circumstances devolve, in case of his being poor, on such other relatives of the child in question within the prohibited degrees as may happen to be in easy circumstances, but with right of recourse against the father in the event of his circumstances improving. But there is no such right of recourse in cases where the father's obligation was independent of easy circumstances, and where his excuse for non-performance was not poverty but inability to labour. In this latter class of cases it seems that the burden has to be borne, not only primarily, but ultimately, by the other relatives who are wealthy.

Baillie, 457, paraphrased according to my understanding of the passage beginning "when the father is poor."* The relatives specifically mentioned being the mother, the paternal grandfather, the grandmother, and the paternal uncle, I presume that any others not more remote than the last are meant to be included. As regards the order of chargeability, the only express statement in this passage is that the mother will come before the grandfather, which agrees with the rule laid down in the second clause of s. 154; the father being alive, the mother would inherit to the child with the father to the exclusion of the father's father, though she would inherit with the latter if the father were dead. Presumably the other rules laid down in Baillie, 463, 464, and embodied in ss. 153 and 154, *post*, are meant to apply to this special case

General statutory obligation of parents.

148. Irrespective of the special rules above mentioned, if any person, Muhammadan or other, having sufficient means, neglects or refuses to maintain his legitimate or illegitimate child unable to maintain itself, he may be compelled under the general law of India to make a monthly allowance not exceeding fifty rupees for the maintenance of such child, on pain of a month's imprisonment.

See the Code of Criminal Procedure, chap. xxxvi (ss. 488—490), "Of the maintenance of wives and children," set out in Appendix A. I think a mother could be proceeded against under this section, as read with Act I of 1868, s. 2 (1)—"words importing the masculine gender shall be taken to include females, unless there be something repugnant in the subject or context"—but I know of no case in which such proceedings have been taken.

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* In line 29 of that page, for "will be a debt against the *child*" read "will be a debt against the *father*." It is so in the original (F. A. vol. i, p. 752), and "child" is evidently a slip of the pen.

149. A person of either sex who is in easy circumstances is bound, subject to the rules hereinafter stated as to priority and apportionment of the obligation, to maintain every poor relative within the prohibited degrees who— Duty of relatives within the prohibited degrees.

(1) If male, is either a minor or infirm, or

(2) If female, is husbandless, or married to a husband who cannot or will not support her.

In this last case, however, the person affording maintenance may claim reimbursement from the husband, who, if he has no property, must work in order to repay the amount expended.

Baillie, 463. It is there expressly stated that the relatives who have been ordered to maintain a married woman may have recourse to the husband; and it had just before been incidentally mentioned that poor and rich are equally liable for the maintenance of a wife (and child), from which it may be inferred that a poor man must work in order to maintain his wife, and also in order to reimburse those who have maintained her.

150. Children in easy circumstances may be compelled to maintain their parents (not step-parents) who are poor, even though the latter be not incapable of earning something by their own labour.[1] This obligation is irrespective of sex, and also irrespective of relative wealth. Any son or daughter in easy circumstances may be compelled to pay the whole amount required, and having done so, may call upon the others to contribute equally.[2] Maintenance of parents.

Illustration.

A, who has no income-producing property, has a son, B, with property worth 100,000 rupees, and a daughter, C, with property worth 50,000 rupees. It appears to the judge that a monthly allowance of 100 rupees is required for A's maintenance. He should order B and C to pay 50 rupees each monthly; and on either of them making default, he should order the deficiency to be levied out of the property of the other leaving the latter to recover it from the defaulter by separate suit[3].

[1] It is positively so stated in Hed. 148. "If they (the parents) were to labour for a subsistence, it would subject them to pain and fatigue, from which it is the express duty of their child to relieve them; and hence it is that maintenance to parents is incumbent upon the child, although they should be able to subsist by their own industry." The Fatawa Alamgiri, as represented by Baillie (p. 462), says that opinions differ on the point.

As to step-parents, Baillie expressly says (p. 461) that a son is not obliged to maintain the wife of his father, not being his own mother, unless that happens to be the best mode of providing necessary attendance on the father himself, and it may be inferred that he is under no such obligation to his own mother's second husband, inasmuch as his obligation towards the mother herself after

her second marriage is limited to making advances, recoverable from the husband, in case of urgent need. Baillie, 463.

[2] Baillie, 461. "When there is a mixture of male and female children, the maintenance of both parents is on them alike. So also, if a man has two sons, one having only a *nisab* * and the other his superior in wealth, or one a Mooslim and the other a *zimmee*, they are both equally liable; and if the judge has decreed maintenance against both, and one refuses to give his share, the other should be ordered to pay the whole, with right of recourse against the defaulter for his proportion."

[3] The maintenance of parents is an urgent matter, and may even be a matter of life and death. Hence the summary procedure for the purpose, leaving the defaulter to be proceeded against by the aggrieved party in a regular suit.

Duty of poor sons to destitute parents.

151. A son who is not in easy circumstances is not bound to make an allowance in money for the maintenance of his parents—at all events, if he has a wife and children of his own; but if he is earning more than is absolutely necessary for his own sustenance, and for that of his wife and children, if any, he should allow his mother, if poor, and his father, if both poor and infirm, to live with him and share his food.[1] A poor grandson's duty is the same with respect to grandfathers and grandmothers, whether paternal or maternal.[2]

[1] Baillie, 462. The Kazi Khan is to the same effect; see M. Y., vol. ii, p. 329, s. 1739.

[2] So Baillie, *ubi sup.*; the Kazi Khan, however, notices a difference of opinion as to the maternal grandfather, one Natify holding that he is only in the position of a brother. M. Y., vol. ii, p. 330, s. 1750.

No poor person chargeable for collaterals.

152. A person who is not in easy circumstances is not bound to maintain any blood-relations other than lineal descendants, or lineal ascendants, and these only to the extent indicated in the preceding section.

Baillie, 463. "The maintenance of a mere relative is not incumbent on any poor person; contrary to the maintenance of a wife and child, for whom poor and rich are equally liable." Comp. Hed. 148, where the reasons for making these two obligations absolute are said to be, "because (1) in marrying he subjects himself to the expense of maintaining his wife, as otherwise the ends of marriage would be defeated; and (2) his child, from participation of blood, is a *part of himself*, for whom therefore it is his duty to find support as much as for himself." That "child" here is meant to include "grandchild" seems probable, from what is said at p. 147, that "a grandfather is as a father, and a grandmother as a mother."

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* See s. 140, note 4, *ante*.

153. Generally speaking, the liability for maintenance under s. 149 is imposed upon relatives within the prohibited degrees in proportion to the shares (if any) which they would inherit if the person to be maintained were suddenly to acquire property and die, leaving no other relations.[1]

Liability proportional to rights of inheritance.

Illustrations.

(a) A poor person has a father's father and a son's son, both in easy circumstances. The father's father must contribute one-sixth, the son's son five-sixths, of the amount required for his maintenance.[2]

(b) As between mother and father's father (h.h.s.) the mother must contribute one-third, the father's father two-thirds; and the distribution of liability will be the same, if for the father's father we substitute a brother, a brother's son (h.l.s.), or a paternal uncle (h.h.s.), full or consanguine.[3]

(c) As between brother and brother's son or paternal uncle, the brother is solely chargeable for maintenance, because he would in that case take the whole inheritance, though all three are within the prohibited degrees and capable of inheriting.[4]

(d) If the only relatives in easy circumstances are a maternal uncle and a paternal first cousin, the former must bear the whole charge of maintenance, because the former is, but the latter is not, within the prohibited degrees.[5]

(e) As between paternal uncle and paternal aunt, the uncle is solely chargeable, because he would be sole heir to the exclusion of the aunt, though both are related in the same degree to the person to be maintained.[6]

[1] Baillie, 463; Hed. 148 (Book IV, chap. xv). "Maintenance is due to a relation within the prohibited degrees in proportion to inheritance; in other words, upon him who has the greatest right of inheritance in the said relation's estate, the largest proportion of maintenance is incumbent; and upon him who has the smallest right the smallest proportion, and so of the others, because it is said in the Koran, 'the maintenance of a relation within the prohibited degrees rests upon his heir,' and the word 'heir' shows that in adjusting the rate of maintenance the proportion of inheritance is to be regarded." The reference appears to be to such passages as Kor. iv. 36: "And be good to parents and to those who are of kin, and to orphans and the poor," etc., or Kor. xxx. 38: "And give to him that is of kin his reasonable due," etc. Mahomed Yusoof, vol. ii, p. 330, note to s. 1751, states, on the authority of the Futuh-ool-Kadeer and Rudd-ool-Moohtar, that inheritance is *not* the test where ascendants or descendants are concerned, but rather what they quaintly call "nearness after portion," which seems to mean that the point of first importance is the connection by way of direct lineal descent (the descendant being, so to speak, a portion of the body of the ascendant), and that, as between those who are so connected, the nearer is liable before the more remote. But the learned author admits that neither does this rule hold good without exception. The Rudd-ool-Moohtar, he tells us, does make a laudable attempt to frame a rule on the subject which shall admit of no exceptions, but the statement of this rule extends over two or three pages of closely printed Arabic!

The Door-ool-Mookhtar, according to Baillie, p. 463, asserts that the inheritance-test is applicable only among persons who are equal in respect of propinquity; but it applies, on Mr. Baillie's own showing (p. 464), as between a mother, grandfather, brother, brother's son, or paternal uncle. That is to say, in all these cases the mother is chargeable with only one-third of the poor person's maintenance, though she is one degree nearer in blood than the father's father or brother, and two degrees nearer than the uncle or nephew.

On the whole, the least unsatisfactory course seemed to be to state the general rule as it is laid down in the Hedaya, and to enumerate the exceptions for which there is clear authority without attempting to bring them under any one principle. See s. 155.

[2] Baillie, 464. For the corresponding rules of inheritance, see ss. 214 and 226, *post*. We shall see hereafter that the analogy of inheritance is *not* followed as between father and son.

[3] *Ib.*, and see *post*, s. 215 (mother's share), 229 (father's father's "residuary" right), 231 (brother), 234 (brother's son), 236 (brother's son's son, etc.), 237 (paternal uncle). As to the obligation of a well-to-do mother to share the obligation of maintenance with the father, see s. 145, *ante*.

[4] Not given in Baillie or Hedaya, but to be inferred from the principle therein laid down, and from the case which appears as illustration (*a*) under the next section, where the full and uterine brothers are chargeable to the exclusion of the consanguine brother.

[5] Baillie, 464.

[6] *Ib.*

Devolution of liability where the person, or one of the persons, primarily chargeable is poor.

154. (1) If the relative who is sole heir, and who would be solely chargeable if he were in easy circumstances, happens to be poor, the burden devolves on those who would be the next heirs if he were dead, and in the same proportion.

(2) But if one of two or more persons who are jointly entitled to inherit, and who would be jointly chargeable for maintenance if they were all in easy circumstances, is exempted by reason of poverty, that exempted person will not be treated as dead for the purpose of allocating the burden, but the person, if only one, who would have been jointly entitled to inherit, and therefore jointly chargeable, will now be solely chargeable; and if there are more than one of such persons they will be jointly chargeable in proportion to the shares which they would inherit with the exempted person.

Illustrations.

(*a*) A, a poor person, has a son, B, also poor, a full brother, C, a consanguine brother, D, and a uterine brother, E. Here, if A were to die first, B would be his sole heir, and therefore B, if rich, would be solely chargeable with A's maintenance. B, being poor, is for the present purpose treated as non-existent, and the duty of maintaining A devolves upon those who would on that supposition have been A's heirs had he happened to die leaving property, namely, C and E, in the proportion of five-sixths to one-sixth. D, the consanguine brother, would have been excluded from the inheritance by C, the full brother, and will, therefore, be exempted from the burden of A's maintenance.

(*b*) In the converse case, inasmuch as A, if he happen to survive his son B, would be the latter's sole heir, he would, if rich, be solely charged with his maintenance; being poor, he is treated as non-existent, but in this case the burden of B's maintenance, following the order of inheritance, devolves solely upon C, B's full paternal uncle, to

the exclusion of both D, the consanguine, and E, the uterine, paternal uncle. [See the chapter on Inheritance, *post*, ss. 232, 237.]

(*c*) The facts are the same, except that B is a daughter instead of a son. Here, if A were to die leaving property and all those persons surviving him, B would inherit one-half as Sharer [s. 212, *post*], C, the full brother, would take the other half as Residuary, while D, the consanguine, and E, the uterine, would take nothing; but if B were non-existent at the time of A's death, then C and E would share the inheritance in the proportion of five-sixths and one-sixth. As it is, A being alive, and the question being as to the persons chargeable with his maintenance, B being poor is, of course, exempted, but is not, as in the preceding illustration, treated as non-existent; in other words, E is not charged with a part of the burden under the fiction of being one of A's next heirs, but C, who shares with B the presumptive heirship to A, as things actually stand, is solely chargeable.

(*d*) A, a poor person, has a mother and a full sister, both in easy circumstances, and a uterine sister and a consanguine sister, both poor. Here, if it had been a question of A's inheritance, the distribution would have been mother one-sixth, full sister one-half, uterine sister one-sixth, consanguine sister one-sixth. The full sister and the mother being alone liable, their liability will be in the proportion of $\frac{1}{2}$ to $\frac{1}{6}$ = 3 : 1. Thus the full sister will contribute three-quarters of the maintenance, and the mother one-quarter

If the exempted half-sisters had been dead, the heirs of A would have been, primarily, mother, one-third; full sister, one-half; and then by the "Return," * mother, two-fifths; full-sister, three-fifths. But in accordance with our second rule, this assumption will not be made, and the burden will be apportioned between the mother and full sister, according to the shares which they would actually inherit on A's death as matters now stand; that is, in the proportion of one-sixth to one-half, or one to three.

Both rules and the three first illustrations are taken from Baillie, pp. 464, 465; the fourth illustration from the Kazi Khan, M.Y., vol. ii, p. 337, s. 1763.

155. In the following cases there is distinct authority for apportioning the burden of maintenance otherwise than according to the analogy of the rules of inheritance. Exceptions.

(1) As between parents and children, the children (being in easy circumstances) are solely chargeable, though each parent would take at least one-sixth of the inheritance as against a child, or children, of either sex.

(2) As between mother and father, the father is solely chargeable, though the mother would take certainly a sixth, and possibly a third, of the inheritance.

(3) As between son and daughter, the burden is (probably) to be equally apportioned, though the son would take two-thirds of the inheritance.

(4) As between father and son's son, the father is solely chargeable, though the son's son would take five-sixths of the inheritance.

* As to this, see s. 238.

(5) As between daughter and son's son, the daughter is solely chargeable, though they would share the inheritance equally.

(6) A daughter's son or daughter's daughter will be solely chargeable, even though there be a full or consanguine brother who would inherit to the exclusion of both.

For exceptions (1), (4), (5), (6), see Baillie, 463, 464.

As to (2), see Baillie, 455, and M.Y., vol. ii, p. 322, s. 1711, from the Kazi Khan. It appears that some authorities put the father's father in the same position as the father, while others charge him with only two-thirds of the burden of maintenance, on the ground that the mother would have taken one-third of the inheritance : *Ib.* pp. 367—8, ss. 1765 and 1766. We are doubtless meant to understand that the conditions which would reduce her share of the inheritance to one-sixth (s. 215, *post*) will reduce her burden in the same proportion. [S. 1766 seems at first sight to imply that the co-existence of a brother with the mother and father's father would turn the scale, in the opinion of the author of Kazi Khan, in favour of those jurists who are for exempting the mother entirely ; but there is no apparent reason why it should make any difference, and possibly all that is meant is that this was, as a matter of fact, a feature in the case submitted to Abu Hanifa, or in the case submitted to the Khalifa Abu Bakr—it is not clear which.]

As to (3), see M.Y., vol. ii, p. 330, s. 1751, where it is mentioned that " some of the learned lawyers have said that the maintenance is to be obligatory on them in thirds (*i.e.* two-thirds on the son and one-third on the daughter)," but the author of the Kazi Khan states positively that " the Futwa is in accordance with " the view stated in the text.

As to (5), it is not expressly stated in Baillie, 463, but seems natural to infer, that the same principle would apply as between son's daughter and son's son's son, and so on h.l.s.

As to (6), we should probably be justified in extending the exception to all descendants through females, h.l.s., and perhaps to the mother's father, though this is more doubtful. The Kazi Khan, in discussing a different but cognate question, *viz.* the right to maintenance of a person who is poor but not infirm, quotes one jurist as saying that the maternal grandfather is in the position of a brother, and another as placing him in the position of father's father, and does not attempt to decide between them (M.Y., vol. ii, p. 330, s. 1750).

The Egyptian Code, Art. 401, lays down, on the authority of the Radd-ul-Muhtar, another, not very intelligible, sub-rule to the effect that, if the rich relatives (within the prohibited degrees) are not all of them presumptive heirs of the person whose maintenance is in question, the burden is thrown exclusively, not, as under the general rule, on those who would inherit, but on ascendants, whether presumptive heirs or not, in exoneration of collaterals. Two examples are given, of which only one seems to be in point. The first is that, as between a paternal grandfather and a full brother, the former is solely chargeable. Now according to one set of Hanafi authorities the grandfather would be sole heir to the exclusion of the brother, so that it would be a simple application of our general rule ; while according to the other view, that the grandfather and brother would inherit together (s. 229, *infra*), this special exception would not apply. The second is that, as between a maternal grandfather and a *paternal* uncle (so in the original, the official French version says simply " an

uncle "), the grandfather is solely liable, though the paternal uncle would inherit to his exclusion. A *maternal* uncle would need no special rule to exonerate him, seeing that he could not inherit in presence of the maternal grandfather (ss. 246, 258). This exception appears to be peculiar to the Radd-ul-Muhtar.

156. (*Submitted.*) The obligation to maintain relatives is not, in British India, affected by either party ceasing to profess the Muhammadan religion.

Duty of maintenance unaffected by apostasy of either party.

The case stands thus: The Muhammadan lawyers say (Baillie, p. 466) that maintenance is not due where there is a difference of religion, except to a wife, both parents, grandfathers and grandmothers, a child, and the child of a son. But Act XXI of 1850 enacts that " So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, *by reason of his or her renouncing, or having been excluded from the communion of, any religion*, or being deprived of caste, shall cease to be enforced as law." So far, therefore, as the above-quoted rule of Muhammadan law relates to a difference of religion supervening between two relatives, both born and bred as Muhammadans, in consequence of the person to be maintained having apostatised, it is clearly abrogated; *e.g.* if a Moslem becomes a Christian and afterwards falls into poverty and infirmity while his brother remains a Moslem and rich, the latter must maintain the former in British India, though a Muhammadan Government would hold him absolved from the obligation. How if the apostate brother becomes rich while the Moslem brother becomes poor and infirm? This is a case not contemplated by the Muhammadan lawyers, inasmuch as by their law the apostate would have to fly for his life, nor is it precisely covered by the words of the Act; but the Legislature cannot possibly have intended that a man should be able by changing his religion to relieve himself from responsibilities while retaining the corresponding rights.

If, on the other hand, one of two brothers, originally Christian, were to become a Moslem, no obligation of maintenance would exist either way; not because of difference of religion, but because the Muhammadan Law had no application to either when the relationship between them commenced, in other words, when the younger of the two was born, and there is neither reason nor authority for allowing a person, by changing his own religion, to impose a new personal law upon another person.

PART III—SUCCESSION.

CHAPTER VII.

ADMINISTRATION.

Our learned in the law (to whom God be merciful!) say: "There belong to the property of a deceased person four successive duties [to be performed by the magistrate]—first, his funeral ceremony and burial without superfluity of expense, yet without deficiency; next, the discharge of his just debts from the whole of his remaining effects; then, the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors, according to the Divine Book, to the Traditions, and to the Assent of the Learned."—*Sirajiyyah*, p. 1.

PRELIMINARY.

This topic belongs partly to the substantive law of succession, and partly to the department of adjective or procedural law. Consequently we might expect to find, as we do find in fact, that in British India it is partly regulated by Muhammadan Law, and partly by statutory enactments. The question, what becomes of a man's rights and obligations at the moment of his death? is a question of substantive, and therefore (for Muhammadans in British India) of Muhammadan, law. But such questions as, whose duty is it to give orders to the undertaker? to whom should the creditors of the dead man send in their bills? from whom will his debtors be safe in taking a receipt? who is entitled to take immediate charge of the property? and, above all, what may, and what may not, be done without the intervention of a public officer? are questions of adjective law, the answers to which are not to be sought, in British India, from the Muhammadan Law sources, but from the Anglo-Indian codes or the practice of the Courts. Unfortunately, the ancient Muhammadan text-writers could not foresee this curious dismemberment of their system by a non-Muhammadan Legislature, and saw no special reason for drawing a sharp line between substantive and adjective law in their expositions. Even in England the lawyer in search of a rule of substantive law is sometimes driven to infer it from some old decision on a point of procedure; and there is therefore nothing surprising in the fact that the Muhammadan answer to the first of the above questions has to be gathered mainly from passages dealing professedly with the duties of the kazi.

The first seven sections of this chapter are intended to give the effect of these Islamic authorities as interpreted by British decisions. The remainder of the chapter describes the statutory provisions for the administration of the estates of deceased persons generally, so far as these are applicable to Muhammadans.

ADMINISTRATION LAW GOVERNING MUHAMMADANS AS SUCH.

Estate vests at once in the heirs collectively

157. Subject to the explanations and limitations hereinafter set forth, the estate of a deceased Muhammadan is considered in British India to belong, as from the moment of his death, to his heir or heirs according to

the rules set forth in Chapter VIII; the proportionate interests of the heirs, if more than one, coming into separate existence as from that moment, irrespective of any interval that may elapse before the charges on the estate are paid off and the residue actually distributed.

So much the decisions of the Court compel us to affirm, notwithstanding the above-quoted text of the Sirajiyyah, which seems at first sight to give nothing to the "successors" until the funeral expenses, debts, and legacies have been satisfied. In *Jafri Begam*, 7 All., 822 (1885), it was unanimously resolved by the Full Bench at Allahabad that "upon the death of a Muhammadan intestate, who leaves unpaid debts (whether large or small with reference to the value of his estate), the ownership of such estate devolves immediately on his heirs, and such devolution is not contingent upon, or suspended till, payment of such debts." And in *Amir Dulhin*, 21 Cal., 311 (1894), the Calcutta judges, while dissenting from *Jafri Begum* as regards the principal point involved, used on this point language almost identical with that of their brethren of Allahabad. "The theory of representation is not known to the Mahomedan Law. Under its provisions the estate of a deceased person devolves immediately upon his heirs, charged, however, with his debts, and they are the persons through whom the property should ordinarily be reached,". . . . "There is no intermediate vesting in any one, and no rule of Mahomedan Law by which an individual heir, as such, may be taken to represent either the estate of the deceased or the heirs generally."

In the earlier case of *Assamathem Nissa*, 4 Cal., 142 (1878), a different view had been put forward by Markby, J., namely, that the estate does not immediately vest in the heirs, nor are the heirs immediately liable for the debts, the deceased owner being supposed by a fiction to be represented by the estate itself, just as the Roman lawyers were accustomed to feign *hereditatem dominam esse et defuncti vicem obtinere*;* but that, in transactions for which this fiction would not suffice, and for which the action and judgment of a responsible person were necessary, instead of adopting the Roman plan of allowing a slave of the deceased to represent him, or appointing an *interim* curator, the Muhammadans were accustomed to allow one or more of the heirs themselves to represent the deceased. His brother judges do not appear to have dissented from this theory, though the judges in *Muttyjan*, 8 Cal., 370, 373 (1878), seem to have thought that they did, but the view taken by the majority of another point of law involve in the case rendered it unnecessary for them either to affirm or to disaffirm it. In view of the later cases above referred to, it seems to be no longer maintained at Calcutta, any more than at Allahabad; but it apparently constitutes the *ratio decidendi* of certain Bombay and Madras rulings, to be presently noticed. It certainly accords very well with certain passages of the Hedaya. *E.g.*—

Book XX, chap iv, p. 349 (discussing the duty of the kazi in respect of property of a deceased person in the hands of a stranger, where one of the heirs is present and another absent): "If, in the case in question, the absentee return, there is no necessity for again producing evidence, because he is entitled to the half in virtue of the kazi's decree in favour of the heir that was present; *for any one of the heirs of a deceased person stands as litigant on behalf of all the others, with respect to anything due to or by the deceased, whether it be debt or substance.*" A little further down, however, this statement is qualified as regards

* "That the estate itself is owner and stands in the place of the deceased."

debts due *from* the deceased by the admission that " the creditors are entitled to have recourse to one of several heirs only in a case *where all the effects are in the hands of that heir,*" and that " although any one of the heirs may act as plaintiff in a cause on behalf of the others, *yet he cannot act as defendant on their behalf, unless the whole of the effects be in his possession.*"

Book XXXIX, chap. i, p. 567. The question under discussion being whether the kazi is justified in ordering a partition of land without other proof of the death of the owner and the number of his heirs than the declaration of those who come forward as co-heirs to ask for partition, Abu Hanifa is represented as arguing that such an order " is in fact a decree against the defunct by which his right is terminated; for until a partition take place *the hereditaments are still considered as his estate,* insomuch that, if any increase be produced upon it, such increase is subject to the will of the deceased husband declared in his testament, or is appropriated to the payment of his debts, neither of which could be the case after partition has been made."

The objection urged by Mahmood, J., against so construing these passages does not really amount to more than that the right to a share of the residue (whatever that residue may turn out to be) must be taken to be fixed irrevocably at the moment of death. Whether such a prospective right is properly described as present ownership is rather a question of words than of substance. As a question of words it has been answered judicially in the affirmative; but it should be noted that in both of the judgments above quoted the subject-matter of ownership is described by the somewhat vague term " estate," leaving so far still open the question to what extent any one of the heirs can legally use or dispose of any specific piece of movable or immovable property left by the deceased, either as against his co-heirs, or as against unsatisfied creditors and legatees; or, to put the matter in another way, to what extent the rights of co-heirs, creditors, and legatees are affected by what purport to be alienations (voluntary or involuntary) by one or more of the heirs. The next four sections embody the nearest approach to a definite answer which the present state of the authorities will enable us to give.

But payment of charges should precede individual appropriation. In case of division while there are debts outstanding, each heir is liable only for his own proportion of each debt.

158. No heir is entitled to deal as sole owner with any specific movable or immovable property of the deceased until it has been appropriated to him by judicial authority or by agreement with his co-heirs; and the proper course is for all funeral expenses, debts, and legacies to be paid before any such distribution and separate appropriation take place.[1] If, however, owing to creditors not sending in their claims or for any other reason, the distribution takes place while there are debts still outstanding, the separate ownership of the specific lands or chattels distributed vests none the less in the heirs to whom they have been respectively assigned; but each heir is liable to each creditor of his ancestor, to the extent of the assets that have come into his hands, for a share of the debt proportionate to his share of the inheritance.[2]

The claims of creditors of the ancestor have priority, to the extent of these assets, over the claims of personal creditors of the heir.[3]

[1] *Hamir Singh* v. *Zakia*, 1 All., 57 (1875), at p. 58; *Pathummabi*, 26 Mad., 734 (1902), at p. 738; Hed. 437.

[2] *Pirthi Pal Singh*, 4 All., 361 (1882); Hed. 349, as quoted under s. 157.

[3] *Bhola Nath*, 26 All., 28 (1903). In this case the claim to which priority was adjudged happened to be that of a widow suing for her dower, but any other creditor of the deceased would have enjoyed the same precedence.

No claim by or against an executor, administrator, or heir, as such, can be lawfully joined with claims by or against him personally: the special circumstances which constitute conceptions are specified in the Code of Civil Procedure (Act V of 1908), Order II, rule 5.

159. (1) If, while the estate is still undistributed, one of several heirs, being in possession of some specific property forming part thereof, sells or mortgages the same, the *bonâ fide* purchaser or mortgagee acquires a good title to the whole of the property so dealt with, not merely to the interest therein of the alienor, both as against the other heirs and as against creditors of the deceased;[1] subject, however, to the general rule of law that the rights of parties to litigation actually commenced cannot be affected by any *interim* dealings with the subject-matter.[2]

Effect of alienation by, or decree against, a single heir in possession.

(2) If, while the estate is still undistributed, an unsatisfied creditor of the deceased owner thinks proper to sue the heir so in possession as aforesaid without joining the other heirs, and having obtained a decree seeks to execute it by attachment and sale of the property thus possessed, the execution-purchaser will at all events acquire an interest in the property sold to him proportionate to the share of the inheritance to which that heir was entitled.[3] But as to the effect of such a sale on the shares of the heirs who were not parties to the suit, the different High Courts of British India have given conflicting decisions.[4]

[1] *Land Mortgage Bank* v. *Bidyadhari*, 7 C. L. R., 460 (1879), following *Bazayet Hossein*, 4 Cal., 402, and L. R., 5 I. A., 211 (1878). In this case the parties whose objections were overruled were widows of the deceased, claiming both as creditors in respect of their dowers and as heirs in respect of their shares. The mortgage given by the son, prior to the institution of their suit, was held to be unaffected by either claim.

[2] *Mahomet Wajid*, heard and reported with the above, and being the case which was really followed in *Yasin Khan*, 19 All., 504 (1897), though the judges, overlooking the transition in the judgment from one case to the other, imagined that they were following *Bazayet Hossein*. The existence of *lis pendens* in the second case was the very point which distinguished it from the first.

[3] So much was conceded by implication in the Allahabad judgments discussed below under s. 161, and was expressly decided by the Bombay High Court in *Ambashankar*, 19 Bom., 273 (1894).

[4] As to these, see the two next sections.

Calcutta rulings.

160. According to the decisions of the High Court of Calcutta, if a Muhammadan has died intestate, but no letters of administration have been taken out, any creditor of the deceased may sue any one of the heirs who is in possession of the whole or any part of the property, without joining the other heirs as defendants, and in such a suit a decree may be passed for the sale, not only of that particular heir's proportionate share in the property, but of all assets of the deceased which have come into his hands and have not been applied in discharge of other claims against the estate ; and the other heirs will not be allowed to set aside the decree, so far as it affects them, merely on the ground that they were not represented in the suit,[1] unless they can prove fraud, or that the decree was taken by consent, without full inquiry in open Court.[2]

[1] *Muttyjan*, 8 Cal., 370 (1882), followed in *Amir Dulhin*, 21 Cal., 311 (1895)

[2] This question did not arise in either of the two cases last referred to, but it had been the ground on which the majority of the judges rested their refusal to hold the absent heir bound by the decree in *Assamathem Nissa* 4 Cal., 142 (1878), at p. 155. The objection taken to this view by Mahmood, J. (v. *infra*), seems unanswerable ; namely, that the rule supposed to be laid down by the Hedaya on this point is avowedly a rule of procedure, and that all Muhammadan rules of procedure are superseded by the Civil Procedure Code, which recognises no distinction between decrees taken by consent and those taken in a contested suit.

See also *Sitanath Das* v. *Roy Luchmiput Singh*, 11 C. L. R., 268 (1882), at p. 272.

Allahabad rulings.

161. According to the law laid down by the High Court of Allahabad, a decree relative to his debts, passed in a contentious or uncontentious suit against only such heirs of a deceased Muhammadan debtor as are in possession of the whole or part of his estate, does not bind the other heirs who, by reason of absence or other cause, are out of possession, so as

to convey to the auction-purchaser, in execution of such a decree, the rights and interests of such heirs as were not parties to the decree.[1]

But the circumstances may be such that on grounds of equity an heir who was not party to the decree should not be allowed to recover possession from the auction-purchaser of his share in the property sold, except upon condition of paying his proportionate share of the debt for which the decree was passed, and in satisfaction whereof the sale took place.[2]

Bombay rulings.

The High Court of Bombay, without noticing the conflict of authority described in this and the preceding section, has given decisions approximating in effect to those of Calcutta, but resting on the principle of universal succession which the High Court of Calcutta has disclaimed.[3]

Madras rulings.

According to the High Court of Madras, voluntary alienations, by an heir in possession, for the purpose of discharging the debts of the deceased, will not bind the other heirs or creditors; but they left open the question of a decree against one of the heirs.[4]

[1] The first paragraph of this section follows *verbatim* the wording of the second issue determined by the Full Bench in *Jafri Begum*, 7 All., 822 (1885), the first issue being the question already discussed under s. 157. On this second issue the judgment of the Full Bench was unanimous, but the reasons for it were set forth by Mahmood, J., alone, after taking time to consult the original Arabic authorities. The result of his investigations is summed up in the following passage (p. 840), which is somewhat lengthy, but too important to be curtailed :—

"I have considered the passages of the Hedaya referred to in the Full Bench case of *Hamir Singh* v. *Zakia*, 1 All., 57 (1879), and those cited by Garth, C. J., and Markby, J., in *Assamathem Nissa Bibi* v. *Roy Lutchmeeput Singh*, 4 Cal., 142 (1878). These passages have been understood by those learned judges as governing a case like the present. I have also consulted other original authorities, such as the Fatawa Kazi Khan, Durrul Mukhtar, Shami, and Fathul Kadir. All these books possess high authority, and no doubt there are passages to be found in them, as in the Hedaya, which attach significance to such questions as the following : whether the heir is in possession, whether he is in possession of the whole or only a part of the estate, the amount of the assets in his hands, whether the suit was contentious or non-contentious, whether the decree was passed *ex parte* or in presence of the defendant, and these points the authorities treat as regulating, or at least affecting, the binding effect of the decree upon those heirs who, being either out of possession or absent, are no parties to the litigation. On the other hand, there are passages to show that the decree will bind only the share of the defendant heir, or so much of the property of the deceased as is in the hands of such defendant ; whilst other passages lay down the rule that, even where no property belonging to the deceased has come to the hands of the heirs, the creditor of the deceased must sue them in order to

obtain a decree, which might be executed against any such property of the deceased as may be subsequently discovered. The rule is thus laid down in Fatawa Kazi Khan : 'If the debtor has died without leaving any property in the hands of the heir, even then the heir will be (impleaded as) defendant for the claimant of the debt (that is, the creditor), and evidence will be taken and decree will be passed as to the debt, in order that the creditor may take any assets of the deceased which may be discovered.' This rule is the same as that laid down by Morgan, C. J., and Ross, J., in *Madho Ram* v. *Dilbur Mahul*, N. W P., H. C. Rep., 1870, p. 449, and although the case related to the estate of a deceased Muhammadan, those learned judges decided it without any reference to the Muhammadan Law, and treated the question as simply a matter of procedure. Again, according to the authorities of the Muhammadan Law to which I have referred, the power of one or more heirs to represent absent heirs in a litigation is regulated by the consideration, whether the litigant-heir appears in the suit as plaintiff or as defendant ; and the power of representation is materially affected by the position of the litigant-heir as party to the suit. Further, there is authority for the proposition that a decree passed against the heir in possession as representing the whole estate of the deceased in the litigation may, under certain circumstances, be set aside at the instance of the absent heir to the extent of his share, and that, when this is done, the matter should be adjudicated upon *de novo*, involving the production of evidence by the plaintiff *again*, in order to justify the correctness of the former decision. I do not consider it necessary to cite the original texts which go to maintain these propositions, because I am satisfied that these rules of law are provisions which go only to the remedy, *ad litis ordinationem*, being matters purely of procedure as to array of parties, production of evidence, *res judicata*, and review of judgment, etc. Indeed, they are treated as such in the text-books of the Muhammadan Law itself, and are *in pari materia* with some of the most important proceedings (provisions ?) of our Civil Procedure Code. They are not matters of substantive Law ; they do not constitute rules of inheritance ; and the Courts of British India are no more bound by them than by any such rules of evidence or limitation as the Muhammadan Law may provide for the simple reason that they fall outside the purview of s. 24 of the Bengal Civil Courts Act, which enumerates the matters in which we are bound to administer the Muhammadan Law. Under the opposite view, these rules would be in the anomalous position of conflicting with the provisions of the Civil Procedure Code upon the same subjects, and at the same time be equally binding upon the Courts. But, for the reasons which I have already stated, I do not think any such conflict arises out of the present state of the law in British India. Upon the death of a Muhammadan owner, his property, as I have already shown,* immediately devolves upon his heirs, in specific shares ; and if there are any claims against the estate, and they are litigated, the matter passes into the region of *procedure*, and must be regulated according to the law which governs the action of the Court. The plaintiff must go to the Court having jurisdiction, and institute his suit within limitation, impleading all the heirs against whose shares he seeks to enforce his claim ; and if he omits to implead any of the heirs, the decree would be ineffective as regards the share of those who were no parties to the litigation. The maxim of law, that a matter adjudicated upon between one set of parties in no way prejudices another set of parties, is, of course, the foundation of one of the rules of *res judicata*, which itself is subject to strict limitation, as shown by s. 13 of the Civil Procedure Code (= s. 11 of the Code of 1908) ; whilst even Explanation V of that section cannot be applied, unless the special provisions of s. 30 of the Code † are applicable, and have been duly applied by the Court in allowing one party to sue or defend on behalf of all in the

* See s. 157 and commentary.

† Now represented by Rule 8 in Order I of the First Schedule of the Code of 1908.

same interest. There is, however, no such question in these cases, and to hold that a decree obtained by a creditor of the deceased against *some* of his heirs will bind also those heirs who were no parties to the suit, amounts to giving to a judgment *inter partes*, or rather to a judgment *in personam*, the binding effect of a judgment *in rem*, which the law limits to cases provided for by s. 41 of the Evidence Act.

" But our law warrants no such course, and the reason seems to me to be obvious. Muhammadan heirs are independent owners of their specific shares ; and if they take their shares subject to the charge of the debts of the deceased, their liability is in proportion to the cxtent of their shares. And once this is conceded, the maxim *res inter alios acta nocere non debet* * would apply without any such qualifications as might possibly be made in the case of Hindu co-heirs in a joint family. Now, putting aside questions of fraud or collusion between the creditors of the deceased and the heir in possession, it may well be that such heir, though defending the suit, is incompetent to contest the claim, or, by reason of not being acquainted with the facts of the case, or not possessing evidence, cannot properly resist the claim. There seems no reason why, in such a case, those should be bound by the decree who were no parties to the litigation, and had no opportunity of defending themselves against the creditors' claim by putting forward their own case."

Turning, then, to the distinction taken by the majority of the judges in *Assamathem Nissa's* case, between a decree passed by consent and a decree passed in a contested suit, and conceding that this is supported by certain passages of the Hedaya to which the Chief Justice in that case referred, the learned judge proceeded : " But, with due deference, I am unable to adopt the distinction, because, as I have already pointed out, those passages lay down rules of *procedure* which are not binding upon us, which are in many important respects inconsistent with the rules of the Civil Procedure Code, and at all events we can scarcely adopt some of them with consistency unless we are prepared to adopt also other rules of the Muhammadan Law of Procedure which are complements of the rules so adopted. According to our own rules of procedure, there is no difference between the binding effect of a decree passed by consent and a decree passed in a contested suit. Both render the matter *res judicata*, and neither can bind those persons who were no parties to the litigation. There were, of course reasons arising from the exigencies of life (such as the difficulty of communication and travelling) which induced Muhammadan jurists in the Middle Ages to frame rules of procedure in many essentials different from those which regulate the procedure of our Courts. But those conditions of life no longer exist : the law of British India has framed its own rules of procedure ; and bearing in mind the analogy of the principle by which not only the *lex loci contractus*, but the *lex fori*, regulates all matters going to the remedy, *ad litis ordinationem*, I would reject the rules of the Muhammadan Law of Procedure in connection with the binding effect of decrees upon absent heirs. And it follows that a decree obtained in a litigation to which the absent heirs or those who were out of possession were no parties cannot be executed against them or against their shares in the inherited property. Indeed, such was the view adopted by Garth, C. J., himself in an earlier case (*Hendry* v. *Mutty Lal Dhur*, 2 Cal. 395 (1876), with which I entirely concur, and which is in accord with the Full Bench ruling of this Court in *Hamir Singh* v. *Musammat Zakia*, 1 All., 57 (1879)."

" There is, however, one more important case, and the latest ruling upon the subject, which I must consider. This is the case of *Muttyjan* v. *Ahmed Ally*, 8 Cal., 370 (1882), in which Morris, J., with the concurrence of O'Kinealy, J., went the length of laying down the broad rule that when the creditor of a

* No person ought to suffer in consequence of a transaction between other parties.

deceased Muhammadan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration-suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts are paid. For this view of the law the learned judges relied upon certain rulings, two of them being decisions of the Privy Council. I have consulted these cases, but I confess, with due respect, that I am unable to see how they support the broad rule of law laid down in that case. It seems to me that the nature of an administration-suit is essentially different from an ordinary suit for money brought by a creditor of a deceased person against his heir. I need only refer to s. 213 and to Nos. 105, 130, and 131 of the fourth schedule, read with s. 644 of the Civil Procedure Code, to explain my conception of the nature of an administration-suit.* It appears to me that if every suit to recover a debt from the heir of a deceased debtor, irrespective of the form in which it has been instituted, is to be regarded as an administration-suit, any suit for money or any claim, however small, by tradesmen may be so considered, creating anomalies and difficulties on which I need not, however, dwell."

On this point, as on that dealt with in s. 157, this unanimous ruling of the Full Bench was naturally followed by two of the same judges when they had to decide a similar case shortly afterwards [*Muhammad Awais*, 7 All., 717 (1885)], and in that Court the authority of these decisions has not since been questioned ; but the Calcutta High Court remained unconvinced, and in the case of *Amir Dulhin*, 21 Cal., 311 (1894), already referred to on another point, the decision in *Muttyjan* v. *Ahmed Ally* was not only followed, but defended, as embodying a salutary rule.

" If the creditor of a deceased Mahomedan is to be confined to the recovery of a fractional portion of his claim, notwithstanding that the assets may be wholly in the possession of the person through whom it is sought to enforce it, or is to be postponed until the estate has found its way into the hands of all the persons who are entitled to share in it, as might frequently be the case, we can conceive that very grave injustice might in many cases be perpetrated, and a method sanctioned by which it would be easy to place obstacles in the way of the realisation of the just obligations cast upon the estate. And the technical difficulties which influenced the decisions to which reference has been made in the Allahabad Court, unless they are insuperable, which in our opinion they are not, ought not, we think to be allowed to override such considerations as these. In England, where rules of practice would probably be enforced with greater stringency than in this country, it has been held by a judge of much experience that, when a person possesses himself of the assets of an intestate without having administered, a bill for an account of the specific assets he has received would lie against him as executor *de son tort*, though there be no legal personal representative (*Coote* v. *Whittington*, L. R., 15 Eq., 534 ; and see also *Rayner* v. *Cochler*, L. R., 14 Eq., 262, and *Re Lovett*, L. R., 3 Ch. D., 98). And although the analogy may not be complete between the Mahomedan heir who is in possession of more than his share of the inheritance and the executor *de son tort* of English Law, it is yet sufficiently close to sustain comparison. If, it is said in the last of the cases just referred to, you cannot sue a person as executor *de son tort*, then any person may enter and take possession of the property of the deceased, and he cannot be sued for doing so—a conclusion which the learned judge who tried the case refused to accept."

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* Section 213 of the Civil Procedure Code of 1882 corresponds with r. 13 in Order XX in the First Schedule of the Code of 1908. The concluding paragraph of form No. 41 in Appendix A to the First Schedule of the Civil Procedure Code of 1908 (corresponding to No. 105 in the Fourth Schedule of the Code of 1882) is, " the plaintiff claims that an account may be taken of the movable [and immovable] property of the said E. F., deceased, and that the same may be administered under the decree of the Court."

"In our opinion, then, the suit was properly brought against the appellant, and her liability, we think, is to be measured, *not by the extent of her interest in her late husband's property, but by the assets which have come into her hands, and which she has not disbursed duly in the discharge of the liabilities to which the estate was subject at her husband's death.*"

The divergence between the two High Courts is thus complete; but it is important to observe that the point in dispute is not, strictly speaking, one of Muhammadan Law. At all events, it is not so treated by the Courts. After the abandonment by the Calcutta judges of the vacant-succession theory, and their acceptance of the Allahabad doctrine of the immediate vesting of ownership in the heirs, it became impossible to treat the texts which speak of some of the heirs standing as litigants on behalf of others, and so forth, as other than mere rules of procedure, superseded as such by the procedural law of British India. Hence we have on the one side insistence on the maxim, *res inter alios acta non nocet*, admitted by implication in s. 11 of the Indian Code of Civil Procedure, 1908; and we have on the other side pleas of practical convenience and the confessedly inexact analogy of the English executor *de son tort*. The analogy is certainly incomplete, because the "executor by his own wrong" has usurped the position of a general representative of the deceased, and may therefore be properly compelled to deal with the assets as such a representative would have done, whereas the Muhammadan heir has no need to assume a representative character in order to justify taking possession of property of which he is part-owner, and does not therefore, by the fact of possession, hold himself out as having a right to deal with the whole. But were it complete, the extreme rarity of such a situation in England, compared with the frequency of creditor's suits against heirs in possession in India, will remind us that in England it is a matter of course for a proper representative of the whole estate to obtain judicial recognition very soon after the death, and will put us on inquiry why it is otherwise with Muhammadans in India. The answer has been supplied from a historical point of view at the beginning of this chapter, but it is worth noting here that, although the Probate and Administration Act had been in full force in Bengal for many years before *Amir Dulhin's* case, the reporters did not think it worthwhile to mention that no letters of administration had been taken out, nor the judges to point out that all troubles would have been saved by the adoption of this simple remedy. The full operation of Act V of 1881 having now been extended to all parts of India, it is likely to become more and more usual for the executors or heirs of deceased Muhammadans to make early application for probate or letters of administration, at all events in the class of cases which used formerly to give rise to litigation. If so, ss. 157-161 of this digest will lose most of their importance for the practitioner.

[2] See the third issue in *Jafri Begum* as amended by the Full Bench, and the observations of Mahmood, J., at p. 846. The question was not treated as one of Muhammadan Law, but of the precise application of the favourite maxim of the English Court of Chancery, "he that seeks equity must do equity."

[3] *Khursetbibi* v. *Keso*, 12 Bom., 101 (1887), purporting to follow the Calcutta rulings in Hindu cases which treat the co-heir in possession as representing the whole estate; *Davalava*, 20 Bom., 338 (1895), following the above, and asserting on the authority of *Assamathemnissa* (*ubi sup.*) the identity of the Muhammadan with the Hindu Law on this point.

[4] The old decision in *Pathummabi*, 26 Mad., 734 (1902), has been overruled by the Full Bench decision in *Abdul Majeeth*, 40 Mad., 243 (1915), to the effect summarised in the text.

162. When a widow is in possession of the undistributed property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her

Widow's lien for unpaid dower.

dower or any part of it is due and unpaid, she is entitled as against the other heirs of her husband to retain such possession until her dower-debt is paid, but, in the absence of an agreement to the contrary, she cannot be called upon to account for the profits without being allowed reasonable compensation for forbearing to insist on her right to the dower-debt; this compensation is best calculated on the basis of an equitable rate of interest.[1]

The heirs of such a widow are entitled to continue holding the property so possessed by her after her death, until the dower-debt has been discharged;[2] and it is submitted that she can also in her lifetime validly transfer this *conditional right* (sometimes described as a lien) together with the dower claim itself, by express words to that effect.[3]

But she cannot, as creditor for dower, sell or mortgage *the property itself*, and a deed purporting so to do will only take effect to the extent of the share belonging to her by right of inheritance.[4]

On the other hand she does not, by so taking possession as aforesaid, debar herself from instituting an ordinary suit for payment of the dower-debt.[5]

Probably the same rules hold good of any other creditor of the estate who may happen to be in lawful possession as heir or otherwise.[6]

[1] The latest ruling is that of the Privy Council in *Hamira Bibi*, L. R., 43 I. A., 294 (1916), in which the rents and profits being less than six per cent. interest, the claim for mesne profits was disallowed. Though the case of *Bachun*, presently to be mentioned, was not referred to by their Lordships, that ruling may be considered to have been modified on the question of compensation. In *Bachun* v. *Hamid Hossein*, 14 Moo. I. A., 377, and 10 B. L. R., 45 (1871), the Privy Council said: "It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt, the right is so stated in a judgment of the High Court in a case of *Ahmed Hoossein* v. *Mussumat Khodeja*, 10 W. R., 369 (1869). Whatever the right may be called, it seems to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, *of which she had lawfully, and without force or fraud, obtained possession*, with the liability to account, to those entitled to the property subject to the claim, for the profits received. This seems to have been the ground on which the right of the widow to retain possession was put in *Ameeroonissa* v. *Moorad-oon-nissa*" (as to that case, see below).

What did their Lordships of the Privy Council mean by the important words which I have italicised, and which I have also embodied in the text? A very rigorous interpretation was put upon them in two Allahabad judgments, *Amanut-un-Nissa*, 17 All., 77 (1894), and *Muhammad Karim Ullah* v. *Amani*,

17 All., 93 (1895); namely, that a widow has no lien for her dower unless she can show that she was put into possession with that object, either by contract with her deceased husband, or by some act of his or of the other heirs, or with their consent. The same two judges were responsible for both decisions, and the second was pronounced on appeal from a colleague, whose carefully reasoned judgment on the other side had, as a matter of fact, been delivered before the first, though it had not then been brought to their notice; *Amani* v. *Karim Ullah*, 16 All., 225 (1894). When confronted with it they naturally adhered to their previously expressed opinion on the point of law, though they managed to avoid reversing the decree itself by insisting that the burden lay on the appellants of proving that the widow's possession had not been acquired in one of the ways indicated, and that this burden had not been discharged—a view, by the way, which seems hardly to accord with the Indian Evidence Act. They boldly assumed that the widow in the principal case had been put into possession by her husband in his lifetime, ignoring the express statement of their Lordships (p. 384) that "there was not any agreement on the part of the husband to pledge his estate for the dower," but that "the appellant having obtained actual possession of the estates under a claim to hold them as and for her dower, she is entitled to retain that possession until her dower is satisfied."

In *Ameer-oon-nissa* v. *Moorad-oon-nissa*, 6 Moo. I. A., 211 (1885), the earlier Privy Council decision referred to in the principal case, the widow did not profess to have been put into possession in her husband's lifetime, and certainly had not the consent of her co-heir, who did not even admit that she had been the wife of the deceased; nor was there, in the question put to the Muhammadan law-officer or in his answer, any hint as to either of these points being material.

Nor were the other cases relied on by the Allahabad judges much more favourable to their contention. They speak of "the inference to be drawn from the case of *Mussamut Wahid-un-nissa* v. *Mussamut Sheobrattun*, 6 B.L. R., 54 (1870), and the approval of that decision by their Lordships of the Privy Council in the case of *Syud Bazayet Hossein* v. *Dooli Chund*, 4 Cal., 402, and L.R., I. A., 211 (1878)"; the fact being that the point as to which the former case was cited with approval in the latter had nothing whatever to do with the present question. It was simply that the liability for debts of a deceased Muhammadan attaches to the heirs personally to the extent of assets received by them, and not to property which they may have alienated to a *bonâ fide* purchaser. In both cases the creditor who sought unsuccessfully to follow the property into the hands of a stranger happened to be a widow claiming dower, but in neither case was it alleged that she had ever had possession.

In *Bibee Meerun* v. *Kubiran*, 13 W. R., 49, and 6 B. L. R., 60 (1870), it did not appear that the widow had ever had possession since her husband's death; and *Ali Muhammad Khan* v. *Azizullah Khan*, 6 All., 501 (1883), merely decided that the widow's lien for dower is personal to herself, and does not pass to a purchaser of the estate. As to this, see below, notes 3 and 4.

The one case relied on which is really in point is *Mussamut Meerun* v. *Najeebun*, 2 Agra, 335 (1867), and that was subsequently disapproved by the very judges who decided it. On the facts as found by the Court it was a case of naked possession on the part of the widow, without any other right than might belong to her as co-heir and creditor, and the Court distinctly decided that such possession could not be upheld to the prejudice of the other heirs, from whom her proper course was "to demand the amount of dower due from them and realisable out of the property, in due course of law." In support of this view the Court referred to Macnaghten, Case No. 37 in the Precedents of Marriage, Dower, etc., which, however, is hardly conclusive as to the right of lien, the question put having been as to the right to take the property out and out in satisfaction of dower. The same judges (Pearson and Turner, JJ.), in the somewhat later case of *Syud Imdad Hossein* v. *Mt. Hosseinee Buksh*, 2 N. W., 327

(1869), in which there was no proof of any actual possession by the widow, either rightful or wrongful, held that she was, nevertheless, entitled to bar the claim of the other heirs to possession of their respective shares so long as her dower was unpaid. And they referred to their previous ruling as follows: "Although on a former occasion we followed a precedent cited by Mr. Macnaghten in his work on Mahomedan Law, we are led to doubt the propriety of our former ruling. The claim of the defendant takes priority to the rights of the heirs. She, as a creditor who is present and asserting her claim, is entitled to satisfaction out of the estate of the deceased before any partition among the heirs can be made. This is the conclusion, at which we have arrived, from a consideration of the passages of the Hedaya above cited, and it is entirely in accordance with the opinions of the English authorities on Muhammadan Law, and with the most recent rulings of the Courts in this country. We would refer particularly to *Ahmed Hossein* v. *Musst. Khodeja*, 10 W. R., 369, and *Meer Meher Ally* v. *Musst. Amanee*, 11 W. R., 212."

And not long afterwards the successors of these two learned judges followed their later in preference to their earlier ruling; *Balund Khan*, 2 N. W., 319 (1870). The Calcutta case of *Tajim* v. *Wahed Ali*, 22 W. R., 118 (1874), is a strong one on the same side.

These were the only decided cases on the point down to the date of the 3rd edition of this work, and it was then submitted that on the whole, so far as British case-law was concerned, the balance of authority seemed to be favourable to the view that the widow who finds herself, as must constantly happen, in actual sole possession of some or all of her husband's property at the moment of his death may hold that property against the other heirs until her claim for dower is satisfied, without being required to show either consent on their part or authority from her late husband. Since then there have been two conflicting Calcutta decisions. In *Bibi Tashliman*, 12 C. L. J., 584 (1910), the High Court followed the Allahabad ruling in *Amanut-un-Nissa* v. *Bashirunissa* (*supra*), their attention not having been directed apparently to the other cases; but in *Saherjan Bewa*, 38 Cal., 475 (1911), the same Court expressly dissented from these rulings, and noticed with approval the above remarks of the present writer. There has also been another Allahabad ruling to the same effect, *Ramzan Ali Khan*, 32 All., 563 (1910).

The only Muhammadan authorities bearing on the point are texts treating of the rights of creditors generally, such as those cited from the Hedaya in *Syud Imdad Hossein* (*supra*).

It is also noticeable that the Muhammadan lawyers appear to draw no clear line of demarcation between rights of ownership and rights *in personam*. Thus in *Ameer-oon-nissa* v. *Moorad-oon-nissa* the law-officers gave it as their opinion that any creditor of a deceased Muhammadan is entitled to help himself to money or chattels not exceeding the value of his claim, or to sell the lands of the deceased and repay himself out of the proceeds. This, it is true, was a Shia case, and no Sunni authority appears to sanction the sale of lands. But, even according to Sunni Law, it would seem that a widow as creditor for dower may help herself to money not exceeding the amount of her claim, and presumably any other creditor may do the same. See Macnaghten, Precedents of Marriage, etc., Case 24, p. 275, cited and followed in *Janee Khanum*, 8 W. R., 51 (1867). "So long as the debtor lives he is responsible in person, and on his death his property is answerable; but there is this distinction between money and other property in cases of dower, namely, that the widow is at liberty to take the former description of property, over which she has absolute power; but as to the other property, she is entitled to a lien on it as security for the debt, and it does not become her property absolutely without the consent of the heirs or a judicial decree." In *Ramzan Ali Khan*, cited above, Tudball, J., quoted as above the opinion of the law-officers in *Ameer-oon-nissa* v. *Moorad-oon-nissa*, and

remarked thereon : " This rule of Muhammadan Law, no doubt, has been modified, and is not applicable in the present age, but the widow's right to retain possession of her husband's property in lieu of her dower has sprung from this, and is therefore not dependent on the consent of her co-heirs." This, however, so far as it relates to creditors other than the widow, was a mere *obiter dictum*. No Muhammadan authority for the alleged modification was referred to, and I am not aware of any. If a distinction is now to be drawn between the right of the widow and that of any other creditor, it must be on the ground that the Muhammadan Law has ceased to supply the rule of decision in disputes between creditors and debtors generally, but that the widow's right, however it originated, is now an integral part of the law of marriage and succession, and therefore of modern Anglo-Muhammadan Law. See note 6.

[2] This was the point expressly decided by the Allahabad High Court in *Ali Bakhsh* v. *Allahdad Khan*, 32 All., 551 (1910), following *Azizullah Khan*, 7 All., 353 (1885), and pointing out that the opinion to the contrary expressed by the judges in *Hadi Ali*, 20 All., 262 (1898), was a mere *obiter dictum*, the actual decision being merely to the effect that a *gift* by the widow of property possessed by her on account of unpaid dower was invalid. See also *Tahir-un-nissa Bibi*, 36 All., 558 (1914) : the widow has no legal right to go into possession, and if she never had possession, no right to possession can descent to her heirs. As to the right being transferable, see the next note. The right is not only heritable, but if she is wrongfully dispossessed, she can maintain a suit to recover possession : *Majidmian Banumian*, 40 Bom., 34 (1915).

[3] In both the cases last mentioned it was taken for granted that heritability and transferability must go together. In *Ali Bakhsh* v. *Allahdad Khan*, after carefully reviewing all the cases that might be supposed to have any bearing on the subject, Tudball, J., put the matter thus : " The right is one which the widow secures *as a creditor* for her dower, and it is one to continue holding until her debt is satisfied. Such a right is properly, and *primâ facie*, in the absence of any law or contract to the contrary, it is property which is both transferable and heritable."....." No text, no rule of law, Muhammadan, English, or Indian, has been placed before us to support the contention that this right dies with the widow, and that she has no power to transfer both her dower-debt and its security. This right must not be confounded with a right to sell the actual property, which has been often claimed and as often disallowed." The case then before the Court, was, as we have seen, a claim by heirs of the widow, not an attempted transfer by her " of the dower-debt and its security " ; and it is perhaps not very surprising that no instance of such a transfer, as distinguished from gift or sale of the property itself, is to be found in the reports. Logically, however, it seems hardly possible to admit the soundness of the *decision* that the right is heritable without also assenting to the accompanying *dictum* that it is transferable.

[4] In *Chuhi Bibi*, 17 All., 19 (1894), there was this peculiar feature that the widow, whose attempted mortgage was set aside, was stated to have been in possession in lieu of dower, *and to have had no other title*, the deceased husband's sister being acknowledged to be sole heiress. It is mentioned in the report that the widow was childless, which fact would exclude her from inheritance of land, if the parties were Shias, as we may assume them to have been, though it is not so stated, and would justify the decision that the mortgage was *wholly* inoperative. The judgment, however, states broadly (1) that " it has been held on several occasions in this Court that a Muhammadan widow in possession in lieu of her dower cannot sell any portion of the property," and (2) that " it has never been held, so far as we are aware, that a Muhammadan widow, under such circumstances, can grant a valid mortgage of any portion of the property in her possession in lieu of dower, and the principle of the decisions in which it has been held that she may not sell appears to us to apply equally to the case of her

attempting to mortgage." The same feature appears in *Muzaffar Ali Khan*, 29 All., 640 (1907), which, however, is not so strong an authority on the main point, because the childless widow never had actual possession of the property which she proposed to sell. But in *Ali Muhammad Khan* v. *Azizullah Khan*, 6 All., 50 (1883), which is a leading authority for the proposition that the widow's right to dower does not pass to a purchaser of the estate, it appears clearly from the report that the instrument in dispute purported to convey the widow's interests *both as heiress and as possessor*, and that what the plaintiffs, as co-heirs of the widow, asked for and obtained was recovery of their own shares only, no question arising as to the purchaser's right to the share which belonged to the widow by inheritance.

[5] *Ghulam Ali*, 23 All., 432 (1901).

[6] In *Ameer-oon-nissa* v. *Moorad-oon-nissa*, 6 Moo. I. A., 209 (1855), at p. 219, the *fatwa* of the Mufti states on the authority of " the Sharaya and its commentary " * (it being a Shia case) that " if *any person* have a claim against another, and the debtor deny the debt, the creditor is competent to take the debtor's property which is of the same description as the debt consists of. For example, if the debtor's property consists of cash, and the debt be also for cash, the creditor is justified in taking just so much of the property as is equal to the debt. If the matter of the debt and the debtor's property be of different kinds, for example, if the debtor's property be immovable and the debt be for cash, the creditor is justified in taking so much of the property, the value of which covers the debt, or he may sell it and apply the proceeds to the liquidation of the debt but in no case is it lawful to take more than the debt. It is not necessary to have recourse to the public authorities in order to enable the creditor to take the debtor's property in payment of the debt, but it is better to apply to the authorities." And then the Mufti proceeds to apply this general rule to the particular case submitted to him as follows : " Thus, under the authority of the above doctrines, the wedded wife referred to in the Court's question is competent to take effects of her husband in kind to the amount of her dower in satisfaction thereof, or she may take the value of such effects to the amount of her dower, without resorting to the Courts."

Equal rights of legatees and heirs.

163. One-third of what remains after payment of the debts of a deceased Muhammadan is by law applicable to payment of the legacies bequeathed by him, if any. As between legatees and heirs, neither class has any priority over the other in the order of administration, so that a legatee is not entitled to claim payment in full out of the assets in hand merely because, including sums due to the estate but not yet collected, two-thirds or more of the entire net assets would still be left for the heirs.

Hed. 679. " If a person, whose estate consists partly of ready money and partly of debts due to him from others, bequeath to another one thousand

* No reference is given in the Report, but the text intended is apparently that represented by ss. 312–316, at p. 432 of Vol. II. of Querry's translation of the Sharaya. The words, " it is not necessary to have recourse to the public authorities, etc.," must be taken from the unnamed commentary. The text itself seems to say (and is so explained by the French translator) that this sort of self-redress is only permitted to the creditor when for some reason it is impossible to have recourse to a magistrate.

dirms, and that sum exceed not a third of the existent property, it is paid to the legatee without any deduction. If, on the contrary, it exceed a third of the ready property, he is only to receive a third of the amount in hand; and afterwards a third must be paid to him, of whatever sums may occasionally * be recovered by the heirs,† until in this manner the amount of the legacy be completely discharged. The reason of this is that *the legatee is (as it were) a partner* ‡ *with the heirs;* and therefore, if his claim in particular were discharged with the ready property (by its being applied to the payment of the whole of his legacy), an injury would be occasioned to the right of the heirs, as ready money is allowed to be preferable to money that is due."

Summary.

The general result of the rules above-stated seems to be that there is nothing in the Muhammadan Law to prevent a promiscuous scramble for possession among creditors, legatees, and heirs (no one of these three qualifications conferring a better or worse claim to it than any other), unless and until the kazi intervenes. It seems to be assumed that this intervention will take place at the earliest possible moment, at all events if there is any prospect of dispute; and this accords pretty well with what D'Ohsson describes as the actual practice in Turkey about a century ago.

Turkish administration procedure.

"On the death of the head of a family, it is the duty of the judge, as public curator, to place seals on the house of the deceased. If the heirs choose to come to an arrangement among themselves, they obtain the removal of the seals by capitulation, that is in consideration of a payment, arbitrarily fixed at five, eight, or ten per cent. of the value of the inheritance; but if they choose to insist on a partition by judicial authority, the Registrar of the Court draws up an inventory of the property of the deceased and also a list of the heirs, and an officer of the Court specially charged with this function indicates, with the law in his hands, the Sharers and Residuaries (*les héritiers légitimaires et les héritiers universels*), and determines the share of each" in the goods constituting the inheritance, which goods are then sold by public auction or valued by experts. It generally happens, however, that these proceedings give rise to disputes among the co-heirs, and then the most ordinary accusation is that of embezzling the effects, directed especially against the surviving husband or wife; hence expensive litigation, ending at last in a compromise, if either the complainants have not sufficient proofs, or the accused refuses to take the oath tendered to him. It is added (p. 117) that the officers of the fisc (*Bait ul Mal*) often add their seals to those of the judge, on the pretext of not knowing whether there are any legal heirs, and make the parties pay dearly for removal of the attachment. Tableau Général, Vol. III, p. 116. §

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* This seems incidentally to show that at the date of the Hedaya the business of debt-collecting was ordinarily performed by the heirs as such jointly, and not by any judicially appointed administrator. This does not necessarily follow. The sentence at p. 348 of the Hedaya, "when a division is made of the effects of a deceased person between his heirs and creditors, the kazi must not....." implies that the division of the inheritance by the kazi was the general rule, and it is scarcely to be supposed that a judicial and administrative authority would merely deal with realised assets, without making any attempt to realise the debts owing to the deceased.

† In more modern English, "from time to time."

‡ More accurately "co-sharer." The meaning is simply that the right of the legatees to one-third of the net assets, and the right of the heirs to two-thirds, stand on the same level, and must be satisfied *pari passu*.

§ The *modern* Turkish procedure seems to be not very different from the Anglo-Muhammadan as here described, inasmuch as State intervention takes place only on the application of the heirs, unless (1) the estate is insolvent, or nearly so, or (2) one or more of the heirs are absent, minors, or incapable. See Young, Corps de Droit Ottoman, vol. I.

The English procedure is certainly less drastic than this, and intrudes less roughly on the privacy of the mourners, but it involves substantialy, the same principle, that no one has any right to interfere with the property of the deceased, or to represent him in any way, until he has obtained formal recognition from some public authority, and paid whatever death duties the law for the time being allows the State to exact.

The salutary provision in s. 239 of the Succession Act (X of 1865), giving the District Judge certain powers to protect the property of a deceased person pending probate or administration, has not been incorporated in the Probate and Administration Act (V of 1881), and therefore does not apply to Muhammadans. In practice, however, cases of dispute about property left by a deceased person, are generally attended with a likelihood of a breach of the peace; and if so, the magistrate can take action under sec. 107 or 145 of the Code of Criminal Procedure, 1898, on a police-report or otherwise; and where the deceased was a landed proprietor, whose heirs are minors or females or persons disqualified to manage their own property, large powers are given to the Collector of the District under the local Court of Wards Acts to take any necessary steps for the protection of the heirs (*e. g.* see sec. 13 of the U. P. Act III of 1899, Court of Wards Act). The summary proceedings under the Curators Act (XIX of 1841) only settle the question of possession as between contending claimants (see below, secs. 200-202); while Bombay Reg. VIII of 1827, of which secs. 9 and 10 give powers to a Judge in certain cases are only of provincial application.

The unreformed English procedure found unsuitable.

With the Muhammadan administration procedure, however, the Courts of British India have nothing directly to do. They are neither authorised nor required to put themselves in the place of the kazi on the occasion of the death of Muhammadan, but have to learn the limits of their jurisdiction in such matters from the regulations and enactments of the British Government. But it so happened that the machinery employed for this purpose in England during the first century of British rule in India was more than usually ill-adapted for exportation to Asia. The English *post-mortem* jurisdiction (if the phrase may be allowed) had from ancient times belonged to the Church as distinguished from the State; and when, as the result of the Reformation, the Church was brought completely under the control of the State, this jurisdiction continued to be exercised by the Bishop of the Diocese, assisted by a Chancellor who might be either a cleric or a lawyer. Hence, when the Supreme Court was established at Calcutta in 1774, as the instrument for applying English Law to Europeans in Bengal, and to natives of Calcutta as far as applicable, it was declared to be (*inter alia*) a Court of Ecclesiastical Jurisdiction, with authority to administer and execute within the provinces of Bengal, Bihar and Orissa, "*towards and upon our British subjects there residing*, the ecclesiastical law as the same is now used and exercised in the Diocese of London, in Great Britain, so far as the circumstances and occasions of the said provinces and people shall admit and require"; . . . . to grant probate under the seal of the Supreme Court of the last wills "of all or any of the said British subjects of us, our heirs or successors, dying within the said three provinces," . . and to commit letters of administration under the same seal of the goods, chattels, etc., "of such British subjects as aforesaid who shall die intestate within the three provinces aforesaid." The Charters of the Supreme Courts subsequently established at Madras (1800) and Bombay (1823) contained words capable of being understood as covering Hindus and Muhammadans; but the various enactments, commencing with the Bengal Regulations of 1772 for the Mufassal, and with the Act 21 Geo. III, c. 70, for the Presidency towns, which reserved to Hindus their laws of inheritance and succession, were construed as preventing grants of probate or administration to the estates of such persons, *unless with the consent of all the next-of-kin*.

The result was, as might have been expected, a vast amount of tedious and ruinous litigation, which might have been nipped in the bud by a timely exercise of non-contentious jurisdiction. The first of the provincial Governments to perceive the necessity for action was that of Bombay under the enlightened guidance of Mountstuart Elphinstone. The Bombay Regulation, VIII of 1827, sets forth very fully in its preamble, according to the fashion of that day, what was in the mind of the legislator

Scope of the Bombay Reg. VIII of 1827, as indicated by its preamble.

" Whereas, at the same time that it is in general desirable that the heirs, executors, or legal administrators * of persons deceased should, unless their right is disputed, be allowed to assume the management, or sue for the recovery, of property belonging to the estate, without the interference of Courts of Justice, it is yet in some cases necessary or convenient that such heirs, executors, or administrators, in order to give confidence to persons in possession of, or indebted to, the estate to acknowledge and deal with them, should obtain an acknowledgment of heirship, executorship, or administratorship, from the Zilla Court ;

" *And whereas*, whenever there is no person on the spot entitled or willing to take charge of the property of a person deceased, or when the right of succession is disputed between two or more claimants, none of whom has taken possession, or where the heirs are incompetent to the management of their affairs and have no near relations entitled and willing to take charge on their behalf, or where a person possessed of property dies intestate and without known heirs, it is essential that the Zilla Court should appoint an administrator for the management of the estate ; the following rules are therefore enacted " (for the substance of the provisions that follow, so far as still in force, see the last five sections of this Chapter).

Outside the Bombay Presidency, matters remained as before down to 1841, in which year two important Acts were passed by the Governor-General in Council. Here, again, the preambles are explicit and instructive. That of Act XIX of 1841 (sometimes referred to as the Curators Act) is as follows :—

" *Whereas* much inconvenience has been experienced, where persons have died possessed of movable and immovable property, and the same has been taken upon pretended claims of right by gift or succession ; the difficulty of ascertaining the precise nature of the movable property in such cases, the opportunities for misappropriating such property, and also the profits of real property, the delays of a regular suit when vexatiously protracted, and the inability of heirs when out of possession to prosecute their rights, affording strong temptations for the employment of force or fraud in order to obtain possession ;

The Curators Act, XIX of 1841.

" *And whereas*, from the above causes, the circumstance of actual possession, when taken upon a succession, does not afford an indication of rightful title equal to that of a decision by a judge after hearing all parties in a summary suit, though such summary suit may not be sufficient to prevent a party removed from possession thereby from instituting a regular suit ;

" *And whereas* such summary suit, though it will take away many of the temptations which exist for assuming wrongful possession upon a succession, will be too tardy a remedy for obviating them all, especially as regards movable property ;

" *And whereas* it may be expedient, prior to the determination of the summary suit, to appoint a curator to take charge of property upon a succession, where there is reason to apprehend danger of misappropriation, waste, or neglect, and where such appointment will, in the opinion of the authority making the same, be beneficial under all the circumstances of the case ;

* As to " legal administrators," see below, s. 203, note 4.

"*And whereas* it will be very inconvenient to interfere with succession to estates by the appointment of Curators, or by summary suits, unless satisfactory grounds for such proceedings shall appear, and unless such proceedings shall be required by or on the behalf of parties giving satisfactory proof that they are likely to be materially prejudiced if left to the ordinary remedy of a regular suit . . . ."

Then follow provisions, of which the effect is given in ss. 200-202 of this Digest.

Enactments to facilitate collection of debts due to deceased persons.

The preamble of Act XX of 1841 recites that "it is expedient to provide, greater security for persons paying to the representatives of deceased Hindoos, Mahomedans, and others not usually designated as British subjects, debts which are payable in respect of such deceased persons, and to facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same, and proceeds to formulate provisions which, after being consolidated with certain other enactments by Act XXVII of 1860, are now represented in substance, though with considerable improvement of form and some enlargement of scope, by the Succession Certificate Act, VII of 1889.

The Indian Succession Act, 1865.

In neither of these two general Acts was any notice taken of the Bombay Regulation, which therefore continued to be applicable concurrently with them within that Presidency.

But in the mean time the Legislature had tardily made up its mind to place a complete probate system within reach of the bulk of the native population, though it still shrank from making the use of it universally compulsory. The way had been prepared by the Indian Succession Act, 1865, which neatly codified, for the immediate benefit only of Europeans domiciled in India, native Christians, Armenians, and a few other nondescripts, so much of English Succession Law and the connected procedure as seemed adapted to their requirements, thus superseding the practice under the ecclesiastical side of the Supreme Court (now become the High Court). Then, by the Hindu Wills Act, 1870, those portions of the Succession Act which deal with the mode of executing, proving, and giving effect to wills were extended to Hindus dying or leaving property within the Lower Provinces of Bengal or the Presidency towns of Madras and Bombay. Within this limited range the use of the new procedure was not merely permitted, but insisted on, no will being valid unless executed with the prescribed formalities, and no right under it being maintainable without probate granted; but even here the taking out of administration in cases of intestacy was still left optional.

The Hindu Wills Act, 1870.

The distinction drawn by this enactment between Hindus and Muhammadans is explainable by the fact that a Muhammadan must ordinarily die intestate as regards the bulk of his property, whereas a Hindu can dispose by will of whatever he can dispose of *inter vivos*. The local limitations of the experiment will seem not unnatural if we remember that among Hindus outside Bengal joint ownership with succession by survivorship is the rule, individual succession by will or inheritance the exception, and that the old probate jurisdiction of the Supreme Court had been used to some extent by natives in the Presidency towns. The reason for administration on intestacy being left optional, even when probate of wills was made compulsory, may have been that intestacy would be commonest among the comparatively poor and ignorant, or that forged wills are commoner than false claims of heirship.

The Probate and Administration Act, 1881.

This restricted experiment was followed up, after an interval of eleven years, by a much larger measure—the Probate and Administration Act, 1881; but official opinion was still so much divided as to the expediency of the new departure, that it was left to the several Local Governments to put the most important provisions of the Act in force or not at their discretion; and it was not until 1889 that its operation

became territorially almost co-extensive with British India. Sectionally, it applies to all Muhammadans, as well as to all Hindus, Buddhists, and other persons exempted from the Indian Succession Act; but while it reproduces most of the provisions of that Act which relate to the granting of probate and letters of administration and to the powers and duties of executors and administrators, it contains nothing corresponding to the important sections 187 and 190, which enact that no right as executor or legatee can be established in any Court of Justice without probate of the will under which the right is claimed, and that no right to any part of the property of a person who has died intestate can be established without letters of administration. It has now been decided, though only after elaborate argument in a Court of Appeal, that this omission is intentional; but even now it is by no means easy to say exactly which of its provisions are, and which are not, applicable to persons who might have obtained probate or letters of administration but have chosen to act without either.*

One thing, however, is quite clear about such persons, namely, that they cannot *enforce* payment of a debt due to the deceased (though they may recover it if they can by amicable arrangement, and may even commence legal proceedings for its recovery) without obtaining a succession certificate under Act VII of 1889, or (in the Bombay Presidency) a certificate of heirship or executorship under Regulation VIII of 1827. On the other hand, if the trouble is not as to recovery of debts, but as to possession of the property, other provisions of the Bombay Regulation may be called into play in that Presidency, and elsewhere Act XIX of 1841 is still available.

The Administrator-General's Act, 1874.

Lastly, in order to complete our survey of Indian *post mortem* procedure, something should be said of the functions of the Administrator-General, now regulated by Act II of 1874, as amended by Act V of 1902 (Administrators-General and Offical Trustees), but in substance much more ancient, the office having been created for Bengal in 1849, and for Madras and Bombay in 1850. Confining our attention to that portion of the Act which applies to Muhammadans and others as well as to Europeans, we find that it only comes into operation when such a person dies, leaving assets *within a Presidency town*. Then, either on the application of any person interested as creditor, legatee, next-of-kin, or next-friend of a minor, or on the application of the Administrator-General himself, that officer may be ordered to apply for letters of administration, and to take possession of the property pending the hearing of the application, which will be granted only if no private person appears and shows himself entitled to probate or letters of administration, and only if the Court is satisfied that there is danger of the assets being wasted. Provision is also made for a private executor or administrator transferring his interest to the Administrator-General.

List of enactments.

Thus, while the substantive law of succession, whether testamentary or *ab intestato*, has to be ascertained for Muhammadans of British India almost exclusively from Muhammadan law sources, the procedure by which the legal consequences of death are worked out is regulated by the general statute-law of British India, mostly of very modern date, and is to be gathered from the following enactments:—

The Civil Procedure Code, 1908, sections 50 and 52, Order XXXI in the First Schedule, and Forms 41—44 in Appendix A.

The Probate and Administration Act, 1881, supplemented by the District Delegates Act, 1881, and amended by Act VI of 1889, and Act VIII of 1903.

The Succession Certificate Act, 1889.

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* By Act VII of 1901 the same option has been extended to all native Christians so far as letters of administration in cases of intestacy are concerned.

The Curators Act, XIX of 1841.

Also, for the Presidency towns only, the Administrator-General's Act, 1874, as amended by Act V of 1902.

And for the Bombay Presidency, Regulation VIII of 1827.

Only the most important clauses of this body of statutory law are reproduced in the text of this chapter, the general purport of the whole having been given in the preceding sketch, and minor points being noted where necessary in the commentary.

OF EXECUTORS AND ADMINISTRATORS UNDER THE PROBATE AND ADMINISTRATION ACT, 1881.

Probate optional for Muhammadan executors.

164. The person to whom the execution of the last will[1] of a deceased Muhammadan is by the testator's appointment confided[2] may, but need not, apply for probate of the will to the district judge or district delegate within whose jurisdiction the testator had at the time of his decease a fixed place of abode, or any property, movable or immovable.[3] It is submitted that, with or without probate, he is an executor within the meaning of the Probate and Administration Act, 1881, and the provisions of that Act must be taken to apply to an executor who has not obtained probate, except where the contrary appears from the context.[4]

"Probate" means the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator. It can be granted only to an executor appointed by the will.[5]

[1] Oral or written (*Haji Mahomed Abbu*, 24 Bom., 8 (1899)). The High Court rested its judgment mainly on the ground that the Indian Succession Act, which expressly permits the making of oral wills by soldiers on active service, and which also makes probate compulsory in all cases for the classes of people to whom it applies, nevertheless resembles this Act in giving no separate directions as to how probate of an oral will is to be obtained, and in seeming to require that application for probate shall be made "with the will annexed." The petition in this case was accompanied by the joint affidavit of two witnesses as to the oral provisions made by the deceased, "which we distinctly and without any likelihood or error remember;" and this was held to satisfy s. 62 of this Act. At the same time it was remarked that "The Courts naturally regard an oral will with suspicion, and require it to be established by clear proof." As to the Muhamadan Law, see s. 281, *post*.

[2] This is the definition of an executor in s. 3 of the Act. The nearest Muhammadan equivalent is *wasi*, but the equivalence is by no means exact. The Fatawa Alamgiri (Baillie, 665) defines a *wasi* as an *amin*, or trustee, appointed by the testator to superintend, protect, and take care of his property and children after his death. And it is also said that he is the deceased's *qáim muqám*, or

personal representative. In employing these expressions, however the Scotch translator evidently had not in his mind the exact meaning that they would convey to an English lawyer. So far as Muhammadan Law is concerned, the *wasi* is not, like a trustee, legal owner of the property left by the deceased, nor is he a personal representative in the sense of being the person to sue or be sued in respect of all claims for or against the estate. He is rather a manager, or agent, for the specific purpose of providing for the payment of funeral expenses, debts, and legacies, to which function may happen to be added those of a guardian of the persons and property of any minor children left by the deceased.* Neither is the *wasi* always appointed by the testator ; the same term (unlike the English " executor ") being applied in the Hedaya to a person whom we should call " administrator," *i.e.*, one invested by the kazi with similar authority, in default of appointment by the deceased, or after removal of the testamentary *wasi*.

It is rather curious that s. 2 of the Act specifies " Chapters II to XIII, both inclusive," as those which are to " apply in the case of every Hindu, Muhammadan, Buddhist and person exempted under s. 332 of the Indian Succession Act, 1865," thus excluding the interpretation clause, s. 3 in Chap. I, which is obviously necessary to the proper understanding of all the rest. It is difficult to believe, for instance, that the Indian legislature can have deliberately intended that the term " executor " should have one meaning for the classes governed by the Succession Act and another meaning (unexplained) for Hindus, Muhammadans, etc. It may, however, have been the intention to leave untouched any particular incidents attaching to the office under Hindu or Muhammadan law, especially with regard to religious or domestic usages.

[3] Ss. 56 and 58 of the Act. It is only in non-contentious cases that the grant may be made by a district delegate.

That the taking out of probate and letters of administration is not obligatory, except for persons governed by the Indian Succession Act or the Hindu Wills Act, was decided in *Shaik Moosa* v. *Shaik Essa*, 8 Bom., 241 (1884), as to an executor who has not taken out probate, and in *Krishna Kinkur Roy* v. *Panchuram*, 17 Cal., 272 (1889), as to legatees and heirs who have not taken out letters of administration with the will annexed. The correctness of these decisions is, of course, assumed in the recent Act extending the option to native Christians.

[4] The statement in the text was disapproved by Pugh, J., in *Sakina Bibee*, 37 Cal., 839 (1910), after expressing agreement with the preceding sentence, which alone was necessary to his decision. It is due to the learned judge that his remarks on this point, though only made *obiter*, should be quoted *in extenso*, and carefully examined.

" With due respect to the learned author (*i.e.* the present writer) he seems to be following the same line of reasoning which Mr. Justice West adopted in *Fatma* v. *Shaik Essa*, 7 Bom., 266 (1883), which has been held to be wrong by the Appellate Court, and it seems to me that the consequences provided in case of the Probate and Administration Act, as following upon a grant of probate, do not and cannot apply where there is no probate. It appears to me that in case of a non-probated will, if I may use the expression, the position must be as it was before the legislation, *i.e.*, the will is a gift from the testator to the legatees, and the executor is merely a manager to carry out the intentions of his testator. I notice, however, from the same passage, that the learned author, quoting from the Fatawa Alamgiri, Baillie, 665, states that according to the Mahomedan law the position of a *wasi*, who would correspond to an executor, is that of an *amin* or trustee [quoting substantially from note 2, *supra*]. In my judgment, therefore, the position of an executor who does not take probate is the same as that of a

* In this capacity a grant of probate would presumably render unnecessary any formal declaration of guardianship under the Guardians and Wards Act, 1890.

Hindu or Mahomedan executor before the Succession Act, and it is satisfactory to find that it is almost exactly that of the *wasi* or *amin* under the Mahomedan Law."

Now in the first place, if the learned judge had happened to read on for a few pages in this chapter he would have discovered that, so far from relying on the reasoning of Sir R. West in the judgment which was reversed on appeal, I quote more than once from the judgment of the Appellate Court in *Shaik Moosa* v. *Essa*, as my authority for treating specific provisions of the Probate Act as applicable to executors without probate. See under ss. 175, 179. But not merely are certain remarks of Sargent, C. J., in that case directly opposed to the contention of the learned judge ; the very decision itself rests, as regards one of its branches, directly on the proposition embodied in my text. For after dissenting from the judgment of West, J., so far as it laid down that probate was compulsory for Muhammadans, he proceeded to deal with the case as it then presented itself of *three non-proving executors*, one of whom desired to prosecute the suit against the wishes of the other two ; and in dealing with this issue he refused to look at the Muhammadan law, which was alleged to be favourable to such a proceeding, and framed his decree in accordance with s. 92 of the Act, which allows one of several executors to exercise the powers of all if, and only if, he has proved the will. According to the *obiter dictum* of Pugh, J., he ought to have been guided in determining this issue either by the Muhammadan law simply, or by the practice of the Courts in dealing with Hindu and Muhammadan executors before the Probate Act came into force.

Weighty as is the authority of *Shaik Moosa* v. *Shaik Essa*, the subsequent action of the Indian legislature is to my mind still more conclusive. The Probate and Administration Act, 1889, s. 14, substitutes for s. 90 of the principal Act a new section, the two first clauses of which are as follows :

> " 90. (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the *property for the time being vested in him under s.* 4.
>
> (2) The power of an executor to dispose of immovable property *so vested in* him is subject to any restriction which may be imposed in this behalf by the will appointing him, *unless probate has been granted him, and the Court which granted the probate permits him, by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in the manner permitted by the order.*"

Here we have a distinct statutory recognition of the very fact denied by the learned judge, namely the vesting of property, under s. 4 of the principal Act, in a non-proving executor.

The last-mentioned section, by the way, was noted in the 3rd edition of this work among those of which the non-applicability to an executor without probate might be thought to appear from the context. The decisive repudiation of this view by the legislature in 1889 had been overlooked. Clearly inapplicable to a non-proving executor are, s. 98 (whether in its original form or in that substituted by Act VI of 1889), and s. 127. The application of ss. 88 and 89 to non-proving executors is restricted, not by anything in the context, or in the Act, but by the Succession Certificate Act, VII of 1889, s. 4 (1).

[5] P. & A. Act, s. 3.

Cannot be refused, except to minor or lunatic.

165. Probate cannot be granted to any one who is a minor or is of unsound mind.[1] But where on application for probate by a person appointed executor under a will, the genuineness of the will is not disputed, and the applicant

is a person not legally incapable, the Court has no discretion to refuse probate on the ground that the applicant is not in its opinion a fit and proper person to be appointed executor.[2]

[1] P. & A. Act, s. 8.

[2] *Hara Coomar Sircar*, 21 Cal., 195 (1893). "We do not think that a Court acting under the Probate and Administration Act has any more discretion than a Court of Probate has in England, where it seems to have been held that a person convicted of felony, or one who is attainted and outlawed, may maintain a suit for establishing the validity of a will by which he is appointed executor (see *Smethurst* v. *Tomlin*, 30 L. J. Pro., 269 ; *In the goods of Samson*, L. R., 3 P. & D., 48 ; and Williams on Executors, 9th ed., vol. i, p. 186)."

On both of the above points the Muhammadan law is the same. "The appointment of a minor or of an insane person, whether permanently so or with lucid intervals, is unlawful. But a woman, or a blind person, or a person who has undergone the *hudd*, or specific punishment for slander, may lawfully be appointed an executor. Where a minor has been appointed an executor the judge should remove him" (Baillie, 669). In the same passage a difference of opinion is noted as to whether the acts of a minor executor before removal are valid, showing incidentally that executors generally were competent to act without any official recognition in the nature of probate. The current opinion, however, is stated to be that the minor's acts are not operative ; and the same principle would doubtless be applied by the Courts to acts done by a minor executor without probate. It is only in cases governed by this Act that the question can arise, because under the Indian Succession Act no right can be established without probate, and probate cannot be granted to a minor.

166. When several executors are appointed, probate may be granted to them all simultaneously or at different times. When probate has been granted to several executors and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

Grant to several executors. Survivorship.

P. & A. Act, ss. 9 and 11. S. 10 deals with the case of a codicil discovered after grant of probate.

167. In an application for probate it is not the province of the Court to go into the question or title with reference to the property of which the will purports to dispose, or the validity of such disposition ; the only questions for determination are as to the appointment of executors and the validity and contents of the will.

Scope of inquiry on application for probate.

Hormusji Navroji, 12 Bom., 164 (1887) ; *Kurrutulain Bahadur*, 33 Cal., 116 (1905).

168. Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

Effect of probate.

P. & A. Act, s. 12. This section, like many others, would doubtless have been differently worded had the draftsman foreseen that probate would be left optional under the Act as ultimately passed, and that, consequently, all wills duly executed in accordance with the personal law of the testator would have full validity before probate. The Bombay High Court, however, in the case above-cited of *Shaik Moosa* v. *Shaik Essa*, considered that the apparent contradiction might be reconciled by treating the section as " a condensed statement of the English law, which regards probate as the authenticated evidence of the will itself, from which [latter] the executor derives his title, and by virtue of which the property vests in him from the death of the testator." They would apparently construe the words " establishes the will from the death of the testator " as meaning " is conclusive (though not the only admissible) proof of the genuineness of the will, and of the date of the testator's death ; " and would construe "renders valid, etc.," as meaning " proves to have been valid *ab initio*."

Administrator, how defined and how appointed.

169. An administrator as defined in the Probate and administration Act is " a person appointed by competent authority to administer the estate of a deceased person when there is no executor."[1] The only mode of appointment indicated in the Act is a grant of " letters of administration " by a district judge or district delegate, and all the provisions of the Act which relate to administrators must (*it is submitted*) be taken to refer exclusively to persons to whom such letters have been granted, and not to the heirs of a deceased Muhammadan, dealing simply as such with the undistributed estate.[2]

[1] P. & A. Act, s. 3.

[2] This conclusion seems unavoidable, but it must be admitted that it militates to some extent against the construction of the Act embodied in our s. 164, inasmuch as several of the sections, which on that construction would apply to executors without probate, purport to deal conjointly with executors and administrators.* But by no possible construction of this hastily-tinkered Act can we escape some difficulty of the kind ; and there is no actual inconsistency in enacting that certain powers and duties belong to executors with or without probate, and to administrators duly appointed as such, which do not belong to the heirs of an intestate Muhammadan taking upon themselves to administer the estate according to their own law without the intervention of any Court.

Effect of letters of administration.

170. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death, but do not (like probate) render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

* See ss. 4, 88–93 (both inclusive), 98, 100, 184–188.

P. & A Act, ss. 14 and 15. The reason for the difference is that the title of the executor is derived from the will of the deceased, and is merely confirmed by the probate, whereas the title of the administrator (as such) is derived entirely from the letters of administration.

171. Letters of administration cannot be granted to any person who is a minor or is of unsound mind.[1] And it is in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under the Act.[2]

Must be refused to minor or lunatic; *may* be refused to sane adult.

[1] P. & A. Act, s. 13.

[2] P. & A. Act, s. 85, omitting an exception which applies only to Hindus. The reason why the Court has a discretion to refuse letters of administration but not to refuse probate is obvious. The person *primâ facie* entitled to letters of administration is only marked out by the law, which, as Bentham remarked, cannot know individuals. The executor is marked out by the choice of the testator, who presumably knew of, and thought fit to disregard, such an objection as his having been convicted of crime.

172. Letters of administration, with a copy of the will annexed, thereby imposing upon the administrator the duties of an executor, may be granted in the cases, and to the persons, mentioned in ss. 18 to 32 of Act V of 1881.

Administration with will annexed.

These sections deal with cases where for any reason the executor renounces or fails or has not been appointed, or with cases in which grants may be made limited in duration, where the will has been lost or destroyed, or is out of the jurisdiction, or with cases in which grants may be made to agents or attorneys for persons absent or incompetent to act.

173. When a Muhammadan has died intestate, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of a deceased Muhammadan, would be entitled to the whole or any part of such deceased's estate.

Who entitled to administration in case of intestacy

When several such persons apply for administration, it is in the discretion of the Court to grant it to any one or more of them.

When no such person applies, it may be granted to a creditor of the deceased.

P. & A. Act, s. 23, substituting " a Muhammadan " for " the deceased," and " a deceased Muhammadan " for " such deceased." For the rules of

distribution applicable to the estate of an intestate Muhammadan, see the next Chapter.

After grant of probate or administration, no one but the grantee can represent the deceased.

174. After any grant of probate or letters of administration, no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same shall have been granted, until such probate or letters of administration shall have been recalled or revoked.

P. & A. Act, s. 82. And see s. 198, *post*, as to effect of probate on suits pending, and payments already made, under a succession certificate.

POWERS AND DUTIES OF EXECUTORS (WITH OR WITHOUT PROBATE) AND ADMINISTRATORS UNDER ACT V OF 1881.

Character of executor or administrator.

175. The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.[1]

The executor of a deceased Muhammadan is a bare trustee for the heirs as to two-thirds, and an active trustee, for the purposes of the will, as to one-third of the net assets.[2]

[1] P. & A. Act, s. 4, omitting a saving clause as to property passing by survivorship to some other person, which was evidently intended to protect the Hindu joint family system from interference, and can seldom, if ever, have any application to Muhammadans.

As to the application of this section to Muhammadan *wasis* without probate, see under s. 164, *ante*.

[2] *Kurrutulain Bahadur*, 33 Cal., 116 (1905), at p. 128. The will having been proved in this case, the question whether the same description would hold good of a non-proving executor did not arise.

A bare trustee is one who has himself no beneficial interest in the property, and has no duties to perform in respect of it except to transfer it to the beneficiaries when requested to do so; *Re Cunningham* v. *Frayling*, 2 Ch., 567 (J. Stirling's remarks at pp. 571-2), quoted in Lord Halsbury's *Laws of England*, under trusts.

When executor or administrator may sue. Probate or certificate required.

176. A Muhamadan executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living: –

Provided, nevertheless, that an executor who has not taken out probate cannot obtain a decree against a debtor of his testator for payment of his debt, nor execution of a decree already passed without producing either—

(i) A certificate granted under the Succession Certificate Act, 1889, and having the debt specified therein, or

(ii) A certificate granted under the Bombay Regulation VIII of 1827, and having the debt specified therein.

Explanation.—The word "debt" in this proviso includes any debt except rent, revenue, or profits payable in respect of land used for agricultural purposes.

The first paragraph reproduces s. 88 of the P. & A. Act, 1881, only inserting the word "Muhammadan," as our only concern here is with members of that community. The actions that survive the deceased are defined in the next section of the P. & A. Act as "all demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory."

The proviso gives the effect of s. 4 of the Succession Certificate Act, VII of 1889, omitting the references to ss. 36 and 37 of the Administrator-General's Act, which cannot be used by Muhammadans, and to the repealed Act XXVII of 1860. For the practice under this Act and under the Bombay Regulations, see below, ss. 192—199, and 203—206.

The reason why agricultural rents are recoverable without either probate or letters of administration or succession certificate is presumably that the devolution of the right to collect the same would be manifested by mutation of names in the Collector's register.

As regards the effect of death on a right of pre-emption under the pure Muhammadan Law, and as affected by letters of administration under the Probate and Administration Act, 1881, see below, sec. 385 and the note thereto.

177. The power of an executor or administrator to dispose of immovable property is subject to the restrictions imposed by the Probate and Administration Act, 1881, as amended by Act VI of 1889.

Alienation by, how restricted.

See the section substituted for the original s. 90 of the Act.

178. If an executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

Purchase by executor or administrator of deceased's property, voidable.

P. & A. Act, s. 91. As regards this rule at all events, it can make no difference whether the executor has or has not taken out probate ; he is in any case acting in a fiduciary capacity, and as such bound by a broad principle of equity not to deal for his own benefit with the subject-matter of the trust. This principle seems to be fully recognised by the Muhammadan Law, and, indeed, to be carried rather further ; for according to the Radd ul Muhtar, as cited by Ameer Ali, M. L., vol. i, p. 561, an executor is debarred from selling, not only to himself, but also to any person so related to him that the evidence of one would by that law be inadmissible against the other.

One may act alone.

179. When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary in the will or grant of letters of administration, be exercised by any one of them who has proved the will or taken out administration.

P. & A. Act, s. 92. Here again we have a section, transferred *verbatim* from the Indian Succession Act, which seems to assume that every executor who intends to act as such must prove the will. When, in *Shaik Moosa* v. *Shaik Essa*, the Bombay High Court decided that this was not generally necessary, the facts of the case before them raised the further question, whether one of several executors, none of whom has proved the will, can exercise the powers of all, either under this section or under any rule of Muhammadan Law. The Court held that he cannot do so under this section, because it applies in terms only to one who has proved the will ; nor under Muhammadan Law (whatever that law may say on the subject), because that law no longer governs Muhammadan executors in cases to which the Act applies. The suit in question had been instituted by three non-proving executors, two of whom did not wish to proceed with it ; it was therefore ordered that it should stand dismissed unless the third should apply for probate within two months. Having proved the will, he would under this section be competent to proceed alone, notwithstanding the dissent of his co-executors, and whether they proved the will or not.

The view taken by the judges as to the effect of the Act rendered it unnecessary for them to inquire what actually is the Muhammadan doctrine with regard to separate action by one of two or more co-executors ; and the curious disquisition thereupon in the Hedaya, p. 698, which was set out in full in the second edition of this work, is here omitted for economy of space.

Survivorship of powers.

180. Upon the death of one or more of several executors or administrators, all the powers of the office become, in the absence of any direction to the contrary in the will or grant of letters of administration, vested in the survivors or survivor.

P. & A. Act, s. 93. Here the Indian Legislature has in effect given its casting vote in favour of Abu Yusuf. as against Abu Hanifa and Muhammad. See Baillie, 671 ; Hed. 698.

Even Abu Yusuf, however, according to the Hedaya, considered that, although a single executor is *competent* to act alone after the death of his colleague as he might have done in his lifetime, yet it would be *proper* for the kazi to appoint

a new executor in place of the deceased. If, however, the dying executor appointed his fellow to be his own executor, then the latter is certainly competent to act as sole executor of the original testator, according to both the Hedeya and the Fatawa Alamgiri—a doubtful report from Abu Hanifa to the contrary notwithstanding.

181. When probate or letters of administration shall have been granted to a married women, she has all the powers of an ordinary executor or administrator. Powers of married executrix or administratrix.

P. & A. Act, s. 96. This provision would appear superfluous to a Muhammadan, whose law knows nothing of any proprietary disabilities imposed on married women as such. But in the Indian Succession Act, from which it is taken, it is by no means superfluous, because that Act adopts the rule which was in force in England down to 1882, that a married woman cannot become an executrix without the consent of her husband, and it was therefore quite necessary to negative the closely connected English rule that, having accepted office with his consent, she could not, without his consent, perform any act of administration which might be to his prejudice.

182. It is the duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose. Funeral expenses.

P. & A. Act, s. 97 From the nature of the case this duty must be performed by somebody before probate, and since, under s. 4 of the Act (= s. 168 of this Digest), all the property of the deceased vests in the executor, if any, appointed by the will as from the death of the testator, he will have no difficulty in performing that duty if he is at once informed of his appointment, and if there happens to be sufficient cash in the house. There is no mention of administrators in this section, because there can be no administrator until there has been time to obtain appointment as such from a competent authority ; nor does the Act afford any indication as to whose duty it is to perform the funeral ceremonies where there is no executor, which with Muhammadans is probably rather the rule than the exception.

According to the Muhammadan Law, if Sir William Jones's gloss on the Sirajiyyah is to be trusted, this is one of the duties to be performed by the magistrate (see the extract at the head of this chapter) ; but it is hardly credible that an intervention of the magistrate before the funeral can have been at any period the ordinary course. D'Ohsson's description of Turkish procedure, quoted above, does not go that length. Naturally the arrangements for the funeral will be made in the first instance by the heirs jointly, or by the particular heir (usually the widow) who is in possession of the house at the time of the death. In Hed. 699, after stating that, even according to Abu Hanifa and Muhammad (who deny the general right of one of two executors to act without the other), " it is lawful for either executor, singly, to disburse the funeral charges, as a delay in this might occasion the body to become offensive," the writer goes on to remark that for the same sanitary reason a similar power is vested in the neighbours to bury the deceased and charge the expense to his estate, just as the parish authorities would do in England. *A fortiori* it must be the right and duty of the heirs in the absence of an executor and in default of action by the

magistrate. As to the precedence of funeral expenses over other charges, see below, s. 185.

Inventory and account.

183. An executor [who has obtained probate] or an administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner within one year from the grant, or within such further time as the Court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

This is clause (1) of s. 98 of the P. & A. Act, as amended by Act VI of 1889. The words enclosed in brackets are not in either the old or the new section, but are necessarily implied from the fact that the time within which the inventory is to be exhibited by the executor is reckoned from the grant of probate Similarly, clause (3), which makes an executor or administrator punishable under the Indian Penal Code for intentionally omitting to comply with a requisition to exhibit an inventory or account, cannot reasonably be understood as applying to an executor who has chosen to act without probate, in exercise of the liberty deliberately allowed him by the Legislature. The reason assigned by the framers of the Probate and Administration Act, in their "Statement of Objects and Reasons," for allowing this option to Muhammadans and others not governed by the Indian Succession Act or the Hindu Wills Act, was that to insist on probate or letters of administration as essential would "tend to impose upon a multitude of poor and ignorant people, in cases where there is no difficulty or dispute, an unnecessary amount of trouble and expense." Evidently the mischief here apprehended would be just as much incurred by making poor and ignorant people liable to be called upon for inventories and accounts under threat of criminal proceedings. Still, it is strange that in an amending Act, passed with full knowledge of the trouble caused by the ambiguity of the original enactment, care should not have been taken to exclude by express words the possibility of such a construction.

S. 99 of the Act, amended by Act VI of 1888, gives certain directions as to the form of the inventory and the fee chargeable thereon, where the grant is intended to have effect throughout the whole of British India.

Collection of property and debts.

184. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

P. & A. Act, s 100. In the case of an executor who has obtained probate, or of an administrator the enforcement of this duty is facilitated by the foregoing

provision as to inventory and account. In the case of an executor who has undertaken to act without probate, but who fails to show reasonable diligence, it does not seem possible to apply the process indicated in ss. 16-18 of the Act, namely, that the person who would be entitled to administration in case of intestacy should claim letters of administration with the will annexed ; * because the mere refusal, even after formal citation, to apply for probate, is not equivalent to renouncing, or failing to accept, the executorship. He has accepted it, and the best, if not the only, remedy in case of unreasonable delay is for the legatees to sue him for their legacies, the heirs for their shares of the inheritance (already vested in them according to Muhammadan Law, though under the Act he has a temporary and fiduciary ownership), and the creditors of the deceased for what is due to them.

The course prescribed by Muhammadan Law where the executor proves weak and inefficient without being positively dishonest, is for the kazi to join with him some other person as assistant ; if he is proved guilty of malversation, the kazi should remove him (Hed. 698 ; Baillie, 669)

The Probate Act makes no provision at all for such cases. It is not within the province of the District Judge acting as a Court of Probate either to inquire into the fitness of an executor before granting probate or to remove him afterwards for proved unfitness. The " just cause " for which a grant of probate can be revoked (s. 50) must be either some fraud or irregularity in the obtaining of it or some subsequent event rendering it useless and inoperative. Probably a removal might be effected under s. 73 of the Indian Trusts Act, in parts of India where that Act is in force, by treating the executor as a trustee who " has become, in the opinion of a principal Civil Court of original jurisdiction, unfit to act in the trust " ; and probably also the above-mentioned rules of Muhammadan Law not being excluded or superseded by anything in the Probate Act, might be put in force through the medium of a regular civil suit, whether the executor had probate or not. But this course, even if practicable, would generally be less convenient than suits directly enforcing the executor's liability to the parties interested.

Order in which charges are to be satisfied.

185. The collected assets are to be applied by the executor or administrator to the following objects successively.

(1) Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, are to be paid before all debts.

(2) The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges.

(3) Wages due for services rendered to the deceased within three months next preceding his death by any labourer,

* See s. 172 of this Digest.

artisan, or domestic servant are next to be paid, and then the other debts of the deceased according to their respective priorities (if any).

(4) Save as aforesaid, no creditor is to have a right of priority over another ; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend.

(5) Debts of every description must be paid before any legacy.

P. & A. Act, ss. 101-105. In so far as these rules differ from those of Muhammadan Law, they must apparently be taken to supersede the latter, in the absence of any saving clause to the contrary, so far as regards executors (with or without probate) and administrators ; though if there is no executor, and the heirs choose to manage the estate among themselves without letters of administration, they may, and should, be guided by the rules of the Sirajiyyah.

The priority of funeral expenses over debts generally is recognised by both systems, but the Muhammadan Law does not, like the Act, put death-bed charges on the same level with funeral expenses.

The provision for probate expenses being paid next after the funeral expenses and death-bed charges finds, naturally, no exact counterpart in the text-books of Muhammadan Law, but in the Turkish practice described by D'Ohsson, in the extract quoted above, we find the Government looking after its own interest in a much more drastic manner, by sealing up the property until its demands are satisfied.

The favour shown to servants' wages naturally finds no place in a system which assumes that menial service will in general be rendered by slaves.

"*According to their respective priorities, if any.*" This reads rather awkwardly with the next sub-clause, which says that there are to be no priorities among creditors "save as aforesaid." But the intention was to reserve the priority of a creditor who has already obtained a decree over creditors who have not done so ; see *Nilkomul Shaw* v. *Reed*, 12 B. L. R., 287 (1872).

The Muhammadan Law is of course in agreement with clause (5), which amounts to no more than saying that a man can only bequeath what is lawfully his. As the Hedaya puts it (p. 673), "If a person deeply involved in debt bequeath any legacies, such bequest is unlawful and of no effect ; because debts have a preference to bequests, as the discharge of debts is an absolute duty, whereas bequests are gratuitous and voluntary ; and that which is most indispensable must be first considered. If, however, the creditors of the deceased relinquish their claims, the bequest is then valid, the obstacle to it being removed, and the legatee being supposed to stand in need of the legacy.

Distribution of assets.

186. Where an executor or administrator has given such notices as the High Court may, by any general rule to be made from time to time, prescribe, for creditors and others to send in to him their claims against the estate of the

deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he has not had notice at the time of such distribution; but this is not to prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

Creditor may follow assets.

P. & A. Act, s. 139. There is nothing in Muhammadan Law, so far as I know, either to confirm or to contradict this provision. There seems to be no reason why an executor without probate should not avail himself of it, except that whatever cause prevents him taking out probate, whether it be poverty, or ignorance, or the simplicity of the deceased person's affairs, is likely also to prevent him from observing the other formality. It is otherwise with an heir acting as administrator without letters of administration. He may find it convenient to publish similar notices, but he will not, strictly speaking, entitle himself thereby to the special protection afforded by this section, because he is not an administrator as defined in the Act.

A suit where the substantial claim is to recover a legacy, even where the legacy did not receive the assent of the executor under sec. 112 of the Probate and Administration Act, V of 1881, is governed by Art. 123 (and not by Art. 120) of the second Schedule of the Limitation Act, 1877, and therefore in the identical sections in the first Schedule of the Limitation Act, 1908, whether or no the suit involves the administration of the whole estate. The period is therefore 12 years from when the legacy becomes payable or deliverable. *Salebhai Abdul Kader*, 36 Bom., 111 (1911).

187. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

Liability for devastation.

P. & A. Act, s. 146, omitting the illustrations

188. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

For neglect to get in property.

P. & A. Act, s. 147, omitting illustrations.

This and the preceding sections can no doubt be put in force against an executor without as well as with probate. They are not strictly applicable to heirs administering without a grant of administration, but suits raising substantially the same issues will lie on general grounds of "justice, equity, and good conscience," which require that there shall be no wrong without a remedy.

Saving clause.

189. Nothing contained in Act V of 1881 shall—

(*a*) Validate any testamentary disposition which could otherwise have been invalid ;

(*b*) Invalidate any such disposition which would otherwise have been valid ;

(*c*) Deprive any person of any right of maintenance to which he would otherwise have been entitled ; or

(*d*) Affect the rights, duties, and privileges of the Administrator-General of Bengal, Madras, or Bombay.

P. & A. Act, s. 149.

Probate &c. only under the Act.

190. No proceedings to obtain probate of a will, or letters of administration to the estate, of any Muhammadan can be instituted in any Court of British India except under Act V of 1881.

P. & A. Act, s. 150. But see below as to partial substitutes for probate or letters of administration.

Court-fee on probate, etc.

191. The Court-fee leviable on probate of a will, or on letters of administration with or without a will annexed, when the amount or value of the property exceeds one thousand rupees, but does not exceed ten thousand rupees, is two per centum on such amount or value ; when such amount or value exceeds Rs. 10,000 but does not exceed Rs. 50,000, the court-fee is $2\frac{1}{2}$ per cent. : when such amount or value exceeds Rs. 50,000, it is 3 per cent.; provided that if a certificate had been previously been granted in respect of any portion of the same estate under the Succession Certificate Act (VII of 1889) or Bom. Reg. VIII of 1827, the fee payable for the probate or letters of administration shall be reduced by the amount paid for the certificate.

This is No. 11 in Schedule I of the Court Fees Act, 1870, as amended by Act VII of 1910. See also the sections, 19 (*a*) to 19 (*h*) inclusive, added to the Act in 1875, which provide for rectification where too low or too high a fee has been paid in the first instance.

Note that this regulation applies to all probates and letters of administration, whether granted to Europeans, &c., under the Indian Succession Act, or to Hindus and Muhammadans under the Probate and Administration Act. It was, in fact, chiefly as a fiscal measure that the latter was advocated and opposed.

On one side it was alleged to be unfair, and financially unsound, that the bulk of the population should escape death duties, the least oppressive of all forms of taxation ; on the other side it was objected that this form of taxation, however excellent in principle, was new to the people of India, and as such would excite more discontent than an intrinsically heavier but more familiar burden. The result was, as we have seen, that the experiment was not tried at all (except with the Hindus of Bengal and the Presidency towns), until sixteen years after the Indian Succession Act, and then only in a doubly permissive form ; the use of the facilities offered being left to the option of the individual, and the offering of those facilities being left to the option of the provincial governments, some of which withheld their sanction down to 1889 Of the legal position of those still remaining outside the new system something has been said already ; their fiscal position will engage our attention presently. See s. 196, *post*.

The court-fee for a certificate under the Succession Certificate Act, 1889, or Bom. Reg. VIII of 1827, is governed respectively by arts. 12 and 12 A of the Court Fees Act, 1870 as amended by Act VII of 1910.

PROCEEDINGS UNDER THE SUCCESSION CERTIFICATE ACT.

Certificate, where and how to be applied for.

192. Application for a succession certificate must be made to the District Court within the jurisdiction of which the deceased ordinarily resided at the time of his death, or if at the time of his death he had no fixed place of residence, then to the District Court within the jurisdiction of which any part of the property of the deceased may be found, or to some inferior Court which has been invested for this purpose with the powers of the appropriate District Court.

The petition must set forth (amongst other particulars)—

The family or other near relatives of the deceased and their respective residences ;

The right in which the petitioner claims ;

And the debts and securities in respect of which the certificate is applied for.

The Succession Certificate Act, 1889, s. 5, read with s. 26, and s. 6 (1), sub-clauses (*c*), (*d*), (*f*).

The debts and securities specified need not be all those due or belonging to the deceased (*In re Indarman*, 18 All., 45 (1895)) ; but a certificate cannot be granted in respect of a part only of a single debt (*Muhammad Ali Khan* v. *Puttan Bibi*, 19 All., 129 (1896). The same case, however, shows that where a portion of a debt in respect of which a certificate is sought has been discharged it is not necessary for the applicant to pay duty on more than the unsatisfied portion of the debt.

Procedure on application.

193. When the District Court decides (after such notice, and such summary investigation as is provided for in the Act) that the right thereto belongs to the applicant, it shall make an order for the grant of the certificate to him. If the Court cannot decide the right to the certificate without determining questions of law or fact, which seem to it to be too intricate and difficult for determination in a summary proceeding, it may nevertheless grant a certificate to the applicant if he appears to be the person having *primâ facie* the best title thereto.

S.C.A. s. 7 (2) and (3). Obviously the District Court has no discretion to refuse a certificate to a person claiming as executor on the ground that in its opinion it would be more convenient that he should take out probate ; *Kalidas* v. *Bai Mahali,* 16 Bom., 712 (1892) ; *Dave Liladhar,* 18 Bom., 608 (1893).

Selection among several applicants.

194. When there are more applicants than one for a certificate, and it appears to the Court that more than one of such applicants are interested in the estate of the deceased, the Court may, in deciding to whom the certificate is to be granted, have regard to the extent of interest, and the fitness in other respects, of the applicants.

S.C.A. s. 7 (4). " To whom " means " to which *one* of them." The Court cannot grant separate certificates to different persons for the collection of different debts due to the same estate ; *Shitab Dei,* 16 All., 21 (1893).

Contents of certificate.

195. When the District Court grants a certificate, it *shall* therein specify the debts and securities set forth in the application for the certificate, and *may* thereby empower the person to whom the certificate is granted—

(*a*) To receive interest or dividends on, or

(*b*) To negotiate or transfer, or

(*c*) Both to receive interest or dividends on, and to negotiate or transfer, the securities or any of them.

S.C.A. s. 8.

Court-fee on certificate.

196. The fee leviable on grant of a succession certificate is at the rate of two per centum on the amount or value of any debt or security specified in the original certificate, and three per centum on that of any debt or security to which the certificate is subsequently extended.

The above is substituted by s. 13 of the S.C.A. for article 12 of the first schedule to the Court Fees Act, 1870. As that article originally stood, referring to certificates granted under the Act then in force, XXVII of 1860, it was two per centum on the amount or value of *all* the debts stated to be due to the deceased, unless the total happened not to exceed one thousand rupees, in which case no duty was payable. The certificate-holder was bound, after the expiration of twelve months, and thereafter when required by the Court, to file a statement on oath as to the debts actually recovered, and to pay additional duty on the excess, if any, over the amount originally stated ; but this provision was found so difficult to enforce that it was practically a dead letter. Thus the only difference, from a fiscal point of view, between the holder of a succession certificate and the representative provided with regular probate or letters of administration, was that the former paid two per cent. on the total of *debts*, recovered or recoverable, whereas the latter paid at the same rate on the entire *property*, whether in possession or in action : with total exemption in each case if the taxable aggregate did not exceed one thousand rupees. Now, the representative who elects to content himself with a succession certificate can please himself as to what debts and securities the certificate shall be made to cover, and pays duty on those, whether the aggregate be more or less than a thousand rupees, and on those only. As to the debts not specified, he takes his chance of being able to obtain payment without resorting to the Courts, or, at all events, without carrying the suit on to the decree stage. In many cases, where he has to deal with friendly and trustful creditors, who see no reason to dispute his representative character, his calculation will be verified, and he will make a clear gain by escaping so much duty ; in the contrary event there is still *locus penitentiæ*, as he can have the certificate extended on payment of a higher duty. The fee payable must be deposited at the time of application, to be refunded if the application is not allowed (s. 14).

197. Except as hereinafter stated, the certificate is conclusive as against the persons owing the debts or liable on the securities specified, and affords full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted.

Effect of certificate

S.C.A. s. 16. The person paying must, of course, be careful to ascertain, not only that the payee holds a certificate, but that his particular debt is specified therein ; whereas no such caution is necessary in paying to an executor with probate or to a regularly appointed administrator. As to the causes for which a certificate may be revoked, see s. 18 of the Act. They are substantially the same as for probate and letters of administration.

198. A certificate is invalid if there has been a previous grant of such a certificate or of probate or letters of administration, and is deemed to be superseded by a subsequent grant of probate or letters of administration ; but suits instituted by the certificate-holder may be continued by the probate-holder or administrator, and when a certificate has been superseded or become in-

Effect of previous or subsequent certificate, and of payments to holder of an invalid certificate.

valid by revocation or otherwise, payments made on dealings had thereunder in ignorance of its supersession or invalidity shall be held good as against claims under any other certificate or under the probate or letters of administration.

S.C.A. ss. 20, 21, and 22 (shortened). And see s. 27 as to impounding superseded or invalid certificates.

Effect of decisions under the Act, and liability of holder of certificate thereunder.

199. No decision under Act VII of 1889 upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in the Act shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend of any security, to account therefore to the person lawfully entitled thereto.

S.C.A. s. 25. Similarly, probate decides nothing as to the title to property of which the will purports to dispose (s. 167, *ante*), nor do letters of administration determine finally any question of heirship. Though the District Court is spoken of throughout the Act as the proper tribunal for granting these certificates, this is qualified by a most necessary provision (s. 26, embodied in s. 192 of this Digest) that the Local Government may for this purpose invest any inferior Court with the powers of a District Court, subject to the control of the latter. But for this, the chief object of the Act would have been defeated, because the distance of the District Court would have been prohibitory to most of the comparatively poor persons for whose benefit this alternative procedure is supposed to be provided.

CURATORS UNDER ACT XIX OF 1841.

Summary suit to determine the right to possession and *interim* appointment of curator.

200. Any person claiming a right by succession to the whole or any part of the property of a deceased person may apply to the District Court for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

If the Judge of the District Court considers that there are strong reasons for believing that the party in possession, or taking forcible means for seizing possession, has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, he may, after citing the

party complained of, determine summarily the right to possession (subject to regular suit) and deliver possession accordingly.

If danger is apprehended before the summary suit can be determined, the judge may appoint one or more curators, or may, where the property consists of land, delegate to the Collector or his officer the powers of a curator.

Act XIX of 1841, ss. 1–5 (consolidated).

201. The Court may authorise the curator either to retain possession generally, or until the party in possession gives security that he will deliver up possession when required, or until the inventory prescribed by the Act has been made. It *shall* exact security from the curator, and *may* allow him remuneration out of the property, at a rate not exceeding 5 per cent. Duties and remuneration of curator.

Act XIX of 1841, ss. 6 and 7. S. 9 enacts that the curator shall be subject to all orders of the judge regarding institution or defence of suits and that the express authority of the latter is required for the collection of debts or rents. Even such express authority would not now enable the curator to obtain a decree for an ordinary debt without a succession certificate under Act VII of 1889.

202. The Act is not to be put in force so as to contradict any public deed of settlement, nor in opposition to legal directions by deceased persons; nor is anything therein contained to be an impediment to bringing a regular suit. A summary decision under the Act is to have no other effect than that of settling actual possession; but for this purpose it is final, not subject to any appeal or order for review. Saving clause.

Act XIX of 1841, ss. 15, 17, 18.

PROCEEDINGS UNDER BOMBAY REGULATION VIII OF 1827.

203.[1] Within the Bombay Presidency, any person claiming to represent a deceased Muhammadan[2] may, instead of taking out probate or letters of administration under Act V of 1881, or a succession certificate under Act VII of 1889, apply under Regulation VIII of 1827 to the District Court[3] Procedure.

for judicial recognition as " heir or executor [or legal administrator]."[4] The judge must thereupon invite objections by proclamation, and examine summarily the objections offered, if any, and grant or refuse recognition accordingly; but he may, if the question raised by the objector is complicated or difficult, suspend proceedings until it has been tried by a regular suit.

[1] This section represents the substance of the second, third, and fourth sections of the Regulation.

[2] The Regulation applies in terms to all persons, but since the passing of the Indian Succession Act and the Hindu Wills Act, it can only affect Muhammadans and those Hindus and others who are outside the scope of those enactments.

[3] Representing the " Zilla Court," mentioned in the preamble of the Act.

[4] The first section of the Regulation (not reproduced in the text because practically superseded) shows that " administrator " has not here the sense given to it in the Probate and Administration Act, of a person appointed as such by competent authority, because it is said that " the heir, or executor, or legal administrator, may assume the management, or sue for the recovery, of the property, in conformity with the law or usage applicable to the disposal of such property, *without making any previous application to the Court to be formally recognised.*"

In *Purshotam*, 8 Bom. H. C., A. C. J., 152 (1871), Westropp, C. J., pointed this out, and suggested that the phrase might apply " to such a person as the guardian of a minor, or possibly the duly constituted manager of an undivided Hindu family who have inherited from the deceased." Any one desiring recognition as guardian of a minor will now proceed under Act VII of 1890, so that the words in question have now no meaning at all in relation to Muhammadans.

It has been already mentioned that, according to the original intention of the Regulation, an heir or executor was to be perfectly free to act at once as such without asking any one's leave, taking the risk of his title being challenged in a regular suit; but the Succession Certificate Act has confined this liberty within very narrow limits;

The court-fee payable for a certificate under this Regulation is governed by s. 12A of the Court Fees Act (VII of 1870) as amended by Act VII of 1910.

Effect of certificate.

204. (1) An heir, executor, or administrator, holding the proper certificate under the Regulation aforesaid, may do all acts and grant all deeds competent to a legal heir, executor, or administrator [according to the personal law of the deceased ?], and may sue and obtain judgment in any Court in that capacity.

(2) But as the certificate conveys no right to the property, but only indicates the person who for the time being is in the legal management thereof, the granting of such certificate shall not finally determine or injure the rights of any person; and the

certificate shall be annulled by the District Court, upon proof that another person has a preferable right.

(3) An heir, executor, or administrator, holding a certificate, is accountable for his acts done in that capacity to all persons having an interest in the property in the same manner as if no certificate had been granted.

This is s. 7 of the Regulation, except the words in brackets, which are inserted in order to raise the question whether a Muhammadan certificated under this Regulation simply obtains thereby judicial recognition as being invested with the rights, and charged with the duties, appertaining to a Muhammadan *wasi*, or co-heir (as the case may be); or whether he also brings himself under all or any of the provisions of the Probate and Administration Act relating to the executors and administrators. On the one hand, the fact that s. 98 of the P. & A. Act (with respect to the exhibition of inventories, &c.) is by s. 28 of Act VII of 1889 expressly made applicable to certificate-holders under this Regulation tends to show that the Legislature considered the other provisions to be excluded by the terms of the Regulation. On the other hand, it seems odd that the Bombay certificate should exclude a person from the operation of these provisions who would be affected by them if he had taken out neither certificate nor probate.

205. The refusal of a certificate by the Judge does not finally determine the rights of the person whose application is refused, but it is still competent to him to institute a suit for the purpose of establishing his claim.

Refusal does not bar regular suit.

S. 8 of the Regulation.

206. Wherever there is no person on the spot entitled and willing to take charge of the property of a person deceased;

Provisional administration.

Where the right of succession is disputed between two or more claimants, none of whom has taken possession,

Or where the heirs are incompetent to the management of their affairs from infancy, insanity, or other disqualification, and have no near relations entitled and willing to take charge on their behalf,

the Judge within whose jurisdiction such property is may appoint an administrator for the management thereof, until the lawful heir, executor, or administrator appears or the right of succession is determined, or the disqualification is removed, as the case may be, when the Judge, on being satisfied of the facts, shall direct the administrator in charge to deliver over the property to such person

with a full account of all receipts and disbursements during the period of his administration.

If, after proclamation duly published, no person appears and establishes his right, as heir or otherwise, to receive charge of the property, the Judge is to report the case to the High Court, accompanied by an inventory and valuation of the property; and it shall be lawful for the High Court either to direct the property to continue for a further period under the management of the administrator, or to be sold by him under the authority of the Court, and the proceeds to be deposited in the public treasury for the eventual benefit of all concerned.

The first paragraph of this section is s. 9 of the Regulation, the second a brief abstract of s. 10.

It will be seen that this old provincial Regulation corresponds as to subject-matter partly with the Curators Act, XIX of 1841, and partly with the Succession Certificate Act, 1889, but that it is in some respects more comprehensive than the two combined. When the last-mentioned Act was drafted it was hoped and expected that the Bombay Regulation, which had now become the proverbial fifth wheel in the coach, would be repealed. To this, however, the Bombay authorities strongly objected, perhaps because they had not yet made up their minds to sanction applications for probate and administration under Act V of 1881, which was, however, done shortly afterwards. In deference to the objections of the Local Government, the Indian Legislature allowed the Regulation to remain, but so modified its operation by means of certain provisions of the Succession Certificate Act, that it now makes very little difference, as regards the recovery of debts and dealing with securities, whether proceedings are taken under that Act or under the local Regulation.

Probate or letters of administration to supersede certificate.

207. The grant of probate or letters of administration in respect of any property is deemed to supersede any certificate previously granted under Act VII of 1889, or under Bombay Regulation VIII of 1827; and when, at the time of the grant of such probate or letters, any suit or other proceeding instituted by the holder of such certificate regarding such property is pending, the person to whom such grant is made shall, on applying to the Court in which such proceeding is pending, be entitled to take the place of such holder in such suit or proceeding: Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be made good against claims under the probate or letters of administration.

P. & A. Act, s. 152.

CHAPTER VIII.

INHERITANCE.

The Prophet of God (on whom be His blessing and peace!) said: Learn the laws of inheritance, and teach them to the people, for they are one-half of useful knowledge.—*From the opening paragraph of the Sirajiyyah.*

208. Subject to the payment of funeral expenses and debts, and to the limited power of testamentary disposition described in the next chapter, all property which was unconditionally at the disposal of any person immediately before his death or last illness, and which was not validly transferred during his last illness, ought to be distributed after his death according to the rules set forth in this chapter.

What property is governed by the rules of inheritance.

See the passage from the Sirajiyyah prefixed to the preceding chapter.

Like the Roman, and unlike the English system, the Muhammadan Law of inheritance draws no distinction between movable and immovable property. But so rooted is this distinction in the nature of things that in all Muhammadan countries we find two other principles so applied as to withdraw great masses of immovable property from the operation of the law of inheritance; namely, (1) the principle of the paramount landlordship of the Sovereign, and (2) the principle of *wakf*, or religious dedication, as to which see Chap. XI.

For the sake of those readers who are familiar with the joint ownership of father and son according to the most widely prevalent school of Hindu Law, it is perhaps desirable to state explicitly that in Muhammadan, as in Roman and English Law, *nemo est heres viventis*—a living person has no heir. An heir apparent or presumptive has no such reversionary interest as would enable him to object to any sale or gift made by theowner in possession; see *Abdul Wahid*, L. R., 12 I. A., 91, and 11 Cal., 597 (1885), which was followed in *Hasan Ali*, 11 All., 456 (1889). There is a conflict of opinion as to the converse application of this principle; in other words, as to whether a renunciation by an expectant heir in the lifetime of his ancestor is valid, and enforceable against him after the vesting of the inheritance. Macn. Prec. Inh. Case 11, is an authority against its validity, all the stronger because the footnote shows the conclusion to have been arrived at after full discussion, and the same view was taken by the Sudder Court of Bengal in 1827 (*Khanum Jan*, 4 S. D. A., 210) in accordance with the opinion of all the law-officers consulted. The Bombay High Court has recently taken the same view; *Sumsuddin*, 31 Bom., 165 (1906). There was a Madras decision to the country, *Kunhi Mamod*, 19 Mad., 176 (1896); but its weakness

Contingent right of inheritance cannot be transferred or renounced.

was pointed out in previous editions of this work, and it has been abandoned by the Madras High Court, in *Asa Beevi*, 41 Mad., 365. (1917).*

In practice the estate of a deceased Muhammadan often remains for a long time undivided, his descendants continuing to live together like a Hindu joint family. It does not, of course, follow that the law regulating a Hindu joint family should be applied to them, and the Calcutta High Court has expressly decided that from the mere fact of commensality no presumption arises that the acquisitions of the several members are made for the benefit of the family jointly; *Hakim Khan*, 8 Cal., 826 (1882). The Madras High Court has also held that there is no such thing as joint family property under Muhammadan Law; *Mohideen Bee*, 38 Mad., 1099 (1915). On the other hand, the Bombay High Court has held that as regards procedure "a suit for partition of inheritance by Musalmans is hardly distinguishable from a partition-suit by Hindus," and consequently that in such a suit the Court is not bound to confine itself to ascertaining and handing over the plaintiff's share, but may assign his proper share to any defendant who desires it and pays the proper Court-fee, and need not insist on each member suing separately for his own share; *Abdul Kadar*, 23 Bom., 188 (1898).

There was a similar difference between the High Courts of Bombay and Calcutta on the question whether Article 127 of Schedule II of the Limitation Act of 1877, which fixes twelve years as the limit for a suit by a person excluded from joint family property to enforce a right to share therein, was applicable to Muhammadans as well as Hindus. The affirmative was held in *Bavasha* v. *Masumsha*, 14 Bom., 70 (1889), followed in *Fatma* v. *Ghisamboo*, 33 Bom., 719 (1900); the negative in *Mahomed Akram Shaha*, 22 Cal., 954 (1895), following previous decisions of Allahabad and Madras; *Amme Raham*, 13 All., 283 (1890); *Patcha* v. *Mohidin*, 15 Mad., 57 (1891). The same article re-appears in the Limitation Act of 1908, as Article 127 of the First Schedule, but the Bombay High Court, by a Full Bench ruling, have now reversed the whole series of their previous decisions, and held that this article does not apply to a Muhammadan (or any other non-Hindu), not having been proved to have adopted as a custom the Hindu law of the joint family: *Isap Ahmed*, 41 Bom., 588 (1917) all the four older High Courts are now happily unanimous on this point, and no doubt the recently created High Court of Patna and the Punjab would hold the same view if the point arose before them.

The article would not apply even to Khojas and Memons except where the property is shown to have gone through one unimpaired descent and thereafter to have been held by the survivors as joint family property; *Jan Mahomed*, 38 Bom., 449, (1913).

Sharers.

209. The first step in the distribution is to assign certain specified fractions of the whole heritable property to the blood relations hereinafter mentioned, should any such happen to exist, and also to the wife or wives, if any, or to the

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* The Muhammadan Law, agrees with the English Common Law and with English Equity as understood by Lord Eldon, *Carleton* v. *Leighton*, 3 Mer., 671 (1805); the overruled Madras ruling with *modern* views of English Equity (Dart V. and P., p. 911); but the Transfer of Property Act, 1882, s. 6 (*a*), which applies when there is no rule of Muhammadan Law to the contrary, follows the English Common Law, and, as was observed by Jenkins, C. J., in *Sumsuddin* (*suprà*), "looking at the whole scope of the Act there is no reason to suppose that it was intended to establish or to perpetuate the distinction between that which according to the phraseology of English lawyers is assignable in law and that which is assignable in equity."

husband, as the case may be, of the deceased. Such persons are called Sharers.

Sir. 12. "They begin with the persons entitled to shares, who are such as have each a specific share allotted to them in the Book of Almighty God."

210. The share of a single wife, or the collective share of any number of contemporary wives, not exceeding the legal number of four, is one-eighth of the net assets, if the deceased has left any child or son's child,* how low soever; one-fourth, if there be no such issue.[1] Wife, or wives.

Explanation.—This share is in addition to the unpaid dower, if any, which counts as an ordinary debt, and must be paid before the distribution of the inheritance.[2]

[1] Sir, 17, 18; Koran, iv, 12. "Moreover ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath, and the debts. They also shall have the fourth part of what ye shall leave, in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave, after, &c." Numerous decisions recognising this rule will be found in Macnaghten's Precedents and in the digest appended to Sloan's edition.

That the wives' portion is shared equally among them, if more than one, see Macn. Prec. Inh. 14.

That 'issue' or 'children' in this and similar passages does not include descendants of daughters, according to the Sunni lawyers, will appear in the sequel.

[2] As to dower, see Chap. II. ss. 41-48.

211. The share of the husband, where the deceased was a married woman, is one-fourth, if the deceased left such issue as above mentioned; otherwise, one-half. Husband.

Sir. and Koran, as cited above. Of course the husband will deduct this fraction from the unpaid dower, if any, due from him to the estate of his deceased wife; see Macn. Dig. Inh. 88 (1858).

212. The share of a single daughter, where there is no son, is one-half. The collective share of two or more daughters, when there is no son, is two-thirds. Daughter.

* For the sake of brevity, this expression is used throughout to denote the son or daughter of a son, son's son, son's son's son, &c., how low soever; it is not meant to be synonymous with "son's descendant, h.l.s." In this and similar cases no account is taken of descent through females.

K. iv, 11 ; Sir. 18 ; Macn. Dig. Inh. 26 (1804), and 38 (1820). Note particularly that " son " does not here include " son's son." For the position of the latter as against a daughter or daughters, see s. 226, *post*.

If there is a son, the daughters (if any) are not sharers but residuaries : Sir. 18.

As to the invalidity, in Bengal, Assam, and N.W.P. (now the province of Agra), of a custom to exclude daughters, the old rule was stated in *Jammya*, 23 All., 20 (1900). The decision was based on the wording of s. 37 of Act XII of 1887 (Bengal Civil Courts Act), for which see s. 1 of this Digest. Where the parties are Muhammadans, evidence was held to be inadmissible in these areas to prove any custom inconsistent with Muhammadan Law, " regarding succession, inheritance, marriage, ... , or any religious usage or institution." This principle was followed by the Allahabad High Court, in *Ismail Khan*, 4 A. L. J., 793 (1907), but was overruled by the Privy Council on appeal ; *Muhammad Ismail Khan*, 17 C. W. N., 97 (1912). Their Lordships directed evidence to be taken in proof of the alleged tribal custom. Accordingly, in *Ali Asghar*, 39 All., 574, the Allahabad High Court went into the evidence of such custom. It may be noted that in both the last mentioned cases the families concerned belonged to areas outside the United Provinces ; in the first case, to Baluchistan and in the second, to the Punjab ; though the litigation was in the United Provinces.

In the province of Oudh custom would override Muhammadan Law in the matters mentioned in s. 3 (*b*) (1). Where therefore, daughters are excluded by custom from succession, they should be treated as non-existent, for the purpose of calculating the shares of the different Sharers and Residuaries ; *Muhammad Kamil*, L. R., 36 I. A., 210 (1908).

Son's daughter.

213. The daughter of a deceased son takes no specific share in competition with two or more living daughters ; but, if there be only one living daughter and a son's daughter, the former takes one-half as before, and the latter takes the remaining one-sixth which is required to make up the collective daughters' share of two-thirds. Two or more son's daughters take this one-sixth and divide it equally, whether they claim through the same son or through different sons.

In the case of competition between son's daughters and son's son's daughters, or between these last and still lower descendants of the same kind, the rule is the same as between daughters and son's daughters.

Sir. 18 ; Macn. Prec. Inh. Cases 16, 33. Son's daughters are not specifically mentioned in the Koran, but the text above referred to commences " God hath thus commanded you concerning your *children*," and this term was understood by all schools to include remoter descendants tracing through males, it being impossible to suppose that God would not have been more explicit had He intended either to exclude son's sons, to whom previous usage would have given the whole in default of sons, or to allow them to take in entire exclusion of son's daughters, while requiring sons to share with daughters.

214. The father and mother take each one-sixth, if there is any child or son's child, how low soever. [As to the father's rights in his other capacity as Residuary, see s. 228, *post.*] Parents.

Koran, as cited under the next section. Sir., 15 ; Macn. Prec. Inh. Cases 63 (father), 57, 69 (mother) ; Dig. Inh. 18, 19, 23, 40, 44 (mother).

215. If there be no child or son's child, h.l.s., the mother's share is increased to one-third, unless there be— Mother's share increased, when.

(*a*) Brothers or sisters more than one (full, consanguine, or uterine *), in which case her share is only one-sixth ; or

(*b*) Both a wife or husband and a father, in which case the mother has only one-third of what remains after deducting the wife's or husband's share, leaving the other two-thirds of such remainder for the father, in his double capacity of Sharer and Residuary.

Koran, iv, 11. " And the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child ; but if he have no child, and his parents be his heirs, then his mother shall have the third part. And if he have brethren, his mother shall have a sixth part."

Sir. 22. " The mother takes in three cases ; a sixth with a child, or a son's child, even in the lowest degree, or with two brothers and (qu. *or* ?) † sisters or more, by whichever side they are related ; and a third of the whole on failure of those just mentioned and a third of the residue after the share of the husband or wife, and this in two cases, either when there are the husband and both parents, or the wife and both parents."

The Hanafi jurists, therefore, besides interpreting " child " in the manner already explained, understood " and his parents be his heirs " to mean " if and so far as his parents inherit," and gave the most liberal interpretation possible to the term " brethren," short of making the plural include the singular.

See also Macn. Prec. Inh. Cases 23, 24, 41, 54 ; Dig. Inh. 22 (1803), 37 (1820), 46 (1824).

216. If the father be dead, his father takes the same one-sixth share, under the title of " true grandfather," as the father would have taken, but his existence does not like that of the father, prevent the mother from taking Father's father, or "true grandfather."

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* Here and throughout, this adjective is used to denote relationship on the mother's side *only*.

† Lit. " with the two of the brothers and sisters and further." " Or " would be a better translation than " and," it being clearly meant that the existence of two individuals in that degree of kinship will suffice for the purpose, whether they be two brothers or two sisters or one brother and one sister.

one-third of the whole instead of only one-third of the residue in the case mentioned in the preceding section. What is here said of the father's father applies, failing him, to the nearest male paternal ancestor, h.h.s.

Sir. 16. "The true grandfather has the same interest with the father, except in four cases, which we will mention presently, if it please God; but the grandfather is excluded by the father, if he be living, since he is the mean of consanguinity between the grandfather and the deceased."

One of these four cases is that of the mother's third above referred to (Sir. 22, where it is mentioned that Abu Yusuf put the grandfather on a level with the father in this respect). For another, see s. 218 (takes with, instead of excluding, father's mother); and for the third, see ss. 219, 229 (takes with instead of excluding, brothers and sisters, according to some lawyers). The fourth case is connected with slavery and manumission, and therefore cannot arise under Anglo-Muhammadan Law.

"True grandmother."

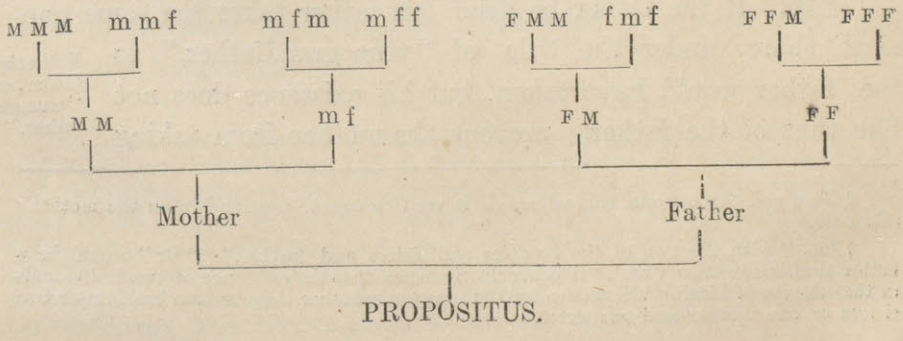
217. If the mother be dead, her minimum share of one-sixth, but not the enlarged share to which she might have become entitled in some of the contingencies above mentioned, devolves upon the "true grandmother," or is distributed amongst the "true grandmothers," if more than one, as defined in the next section, under the conditions there stated.

Definition.

218. A "true grandmother" is a female ancestor between whom and the deceased no "false grandfather" intervenes. A "false grandfather" is any male between whom and the deceased a female intervenes.[1] A female ancestor between whom and the deceased such person intervenes is a "false grandmother."

The annexed table shows the different kinds of "true" and "false" grandparents, and the order in which the former succeed to the shares of the father and mother respectively.

Table of "True" and "False" Grandparents.



The true grandparents are indicated by capital letters.

FF (father's father), and FFF (father's father's father) are true grandfathers; mf (mother's father), and also mmf, mff, fmf are false grandfathers.

FM (father's mother), MM (mother's mother), and also FFM, FMM, MMM are true grandmothers; mfm is a false grandmother,

None of the false grandparents can inherit as Sharers.*

The Father being dead, FF, or on his default FFF (and so on h.h.s.), will take the one-sixth share which F would have taken. Father and Mother being both dead, FM and MM will divide equally between them the one-sixth which would have been the Mother's share; but if the Mother only be dead while the Father is alive, FM can take nothing, and MM will take the whole one-sixth.

If both FM and MM be dead, the true grandmother's share will be divided equally among FFM, FMM, MMM; but no true grandmother in the third generation can take anything while either of the true grandmothers in the second generation is alive and qualified. Consequently, if FM is alive but MM is dead, FM will take the whole one-sixth, unless excluded by the Father; and if MM is alive but FM dead, MM will take the whole one-sixth, whether the Father be alive or not.[2]

[1] Sir. 15.

[2] Sir. 22. There was a speculative difference of opinion with reference to the extremely improbable case of competition between two great-grandmothers one connected with the deceased in two lines, the other only in one line.

The reason why the mother's mother ranks as a Sharer, whereas the mother's father does not, is probably that she is the most likely person, failing the mother, to have had charge of the *propositus* in infancy, and consequently to have gained a place in his affections and to have a substantial claim for some reward.

219. If there be no child or son's child, h.l.s.,[1] and also no father[2] (or true grandfather, h.h.s.[3]), and no full brother, the share of a single full sister is one-half, and the collective share of two or more full sisters is two-thirds, to be divided between or among them equally. Sister.

[1] Koran, iv, 176 "They will consult thee for thy decision in certain cases. Say, God giveth you these determinations concerning the remoter

* Nor as Residuaries. See below, ss. 229 and 246–248

degrees of kindred. If a man die without issue, and have a sister, she shall have the half of what he shall leave [and he shall be heir to her; in case she have no issue]. But if there be two sisters, they shall have between them two-third parts of what he shall leave [and if there be several, both brothers and sisters, a male shall have the portion of two females]."

The bracketed portions of this text relate to the rights of Residuaries, as to which see s. 231, *post* Sir. 20, 21, dealing with the rights of sisters both as Sharers and as Residuaries, shows that "sister" was taken by the Hanafi lawyers to denote a full or consanguine sister, the latter being excluded by the former to the extent shown in the next section and in ss. 231-233, *post*. See also Macn. Prec. Inh. Cases 33, 46, 72 (1), 81 (2).

[2] That sisters are excluded by the father is not expressly stated in the Koran, but it is declared in the Sirajiyyah to have been so agreed [among the learned], doubtless on the ground that something stronger than mere omission would be required to oust the father from his ancient and reasonable rights.

[3] The question whether a true grandfather excludes full or consanguine brothers and sisters, or takes in conjunction with them, is discussed under s. 229, *post*.

Consanguine sister.

220. The share of a single consanguine sister under the like circumstances, there being neither full brother nor full sister nor consanguine brother, is one-half; of two or more, two-thirds. But if there be one, and only one, full sister, she will take her half undiminished, leaving only the remainder of the collective share assigned to two or more sisters, namely one-sixth, for the consanguine sister or sisters.

Sir. 21, the first three of the seven cases there enumerated; Macn. Prec. Inh. Case 73; * Dig. Inh. 57 (1848).

Uterine sisters and brothers.

221. The share of one uterine sister, if there be no child or son's (h.l.s.) child, or father [or true grandfather h.h.s. ?] is one-sixth; of two or more collectively, one-third. Uterine brothers count for this purpose as uterine sisters.

Koran, iv, 12. "And if a man's or woman's substance be inherited by a distant relation,† and he or she have *a brother or sister*, each of them two shall have a sixth part of the estate. But if there be more than this, they shall be equal sharers in a third part."

Sir. 16 shows that the lawyers reconciled this passage with that above quoted (from which it is separated by about 150 verses, though contained

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* Here, as elsewhere in Macnaghten, "uterine" means "full."

† The word so translated means simply a relation who is neither descendant nor ascendant, and includes full or consanguine brother.

in the same long chapter) by understanding it to refer to uterine brothers and sisters, or, as the Sirajiyyah calls them, mother's children. These would not apparently have been regarded by Pre-Islamite custom as having anything to do with the family or with the inheritance, and would not be included in the expression "distant relation." They owe such rights as they now possess entirely to the intervention of the Prophet. A remarkable consequence of this rule combined with others is that a case may occur in which full brothers will be totally excluded, while brothers by the same mother only inherit. A woman dies leaving her husband, mother, two or more uterine brothers or sisters, and one or more full brothers. Here the Sharers are, husband one-half, mother one-sixth, uterine brothers or sisters one-third, thus exhausting the estate, and leaving nothing for the full brothers, who can only inherit as Residuaries. As to the Shafeite rule for redressing this anomaly, by allowing the full brother to participate in the one-third assigned to the uterines, and as to what may be said in justification for the Hanafi rule, see 406A. According to Luciani, Successions Musulmanes, p. 316, and Clavel, Droit Musulman, vol. ii, p 51, tradition assigns this solution (known as *Musharaka*, participation) to the Khalif Omar, reversing, with the approval of the Companions, a previous decision of his own. The second of the above-mentioned writers mentions it as though it were undisputed Hanafi Law, though there is no reference to it in the Egyptian Code, on which his work is a commentary. Luciani, on the other hand, states without qualification that Omar's original decision, allowing the total exclusion of the full brothers in the case supposed, is followed at the present day by the Hanafi school; and this is certainly the doctrine of the Sirajiyyah.

222. If the sum total of the fractions to which different persons are entitled under the preceding rules are found to exceed unity, they must abate rateably. The Increase.

Inasmuch as the arithmetical processes, both the Arabian and the European, by which this abatement is worked out, involve *increasing* the common denominator of the fractions in question, the rule is commonly spoken of as "the doctrine of the Increase (*Aul*)."

Illustration.

A Moslem dies leaving a wife, two daughters, and both his parents. The original shares are—

Wife, $\frac{1}{8}$;

Daughters, $\frac{2}{3}$;

Parents, each $\frac{1}{6}$.

But $\frac{1}{8} + \frac{2}{3} + \frac{1}{6} + \frac{1}{6} = \frac{3}{24} + \frac{16}{24} + \frac{4}{24} + \frac{4}{24} = \frac{27}{24}$.

The common denominator must be increased from 24 to 27, and the actual shares are, $\frac{3}{27}$, $\frac{16}{27}$, $\frac{4}{27}$, $\frac{4}{27}$, $\frac{4}{27}$.

Sir. 30. The illustration is there referred to as "the case called *mimberiyya*, or a case answered by Ali when he was in the pulpit." The Koran itself made no provision for this contingency.

For other examples, see Macn. Prec. Inh. Cases 69, 70; Dig. Inh. 45 (1823).

TABLE OF SHARERS.

Explanatory of Sections 209—222.

Sharer.	Normal share. Of one.	Normal share. Of two or more collectively.	Conditions under which the normal share is inherited, subject to proportionate reduction if the aggregate of shares falls short of unity, and to augmentation in the converse case, if no Residuaries.	Share as varied by special circumstances.
1. Wife ..	$\frac{1}{8}$	$\frac{1}{8}$	When there is a child, or son's (h.l.s.) child, or children	$\frac{1}{4}$ when no child, or son's (h.l.s.) child.
2. Husband ..	$\frac{1}{4}$	—	Same as above	$\frac{1}{2}$ when no child, or son's (h.l.s.) child.
3. Daughter ..	$\frac{1}{2}$	$\frac{2}{3}$	When no son	See Table of Residuaries, p. 291
4. Son's (or son's son's h.l.s.) daughter	$\frac{1}{2}$	$\frac{2}{3}$	When no son, or son's (h.l.s.) son or daughter, or higher son's daughter	$\frac{1}{6}$ when there is a daughter, or higher son's daughter, who take $\frac{1}{2}$. And see Table of Residuaries.
5. Father ..	$\frac{1}{6}$	—	When there is a child, or son's (h.l.s.) child, or children	See Table of Residuaries.
6. Mother ..	$\frac{1}{6}$	—	When there is a child, or son's (h.l.s.) child, or children, or two or more brothers or sisters, or a brother and a sister, and the father	$\frac{1}{3}$ when no child, or son's (h.l.s.) child and not more than one brother or sister (if any); but if there is also a wife or husband and the father, then only $\frac{1}{3}$ of what is left after deducting the wife's or husband's share.
7. True grandfather	$\frac{1}{6}$	—	When there is a child, or son's (h.l.s.) child, or children, and no father, or nearer T. G.	See Table of Residuaries.
8. True grandmother	$\frac{1}{6}$	$\frac{1}{6}$	When no mother, and no nearer T. G. *in the same line*	
9. Full sister ..	$\frac{1}{2}$	$\frac{2}{3}$	When no child, or son's (h.l.s.) child, or father, or brother	See Table of Residuaries.
10. Consanguine sister	$\frac{1}{2}$	$\frac{2}{3}$	When no child, or son's (h.l.s.) child, or father, or brother, or full sister	$\frac{1}{6}$ when there is a single full sister, who takes $\frac{1}{2}$. And see Table of Residuaries.
11. 12. Uterine brother *or* sister	$\frac{1}{6}$	$\frac{1}{3}$	When no child, or son's (h.l.s.) child, or father	

223. So much of the heritable estate as is not exhausted by the "Sharers" hereinbefore described, or the whole if there are no such Sharers, is to be distributed among the relatives called "Residuaries," if there be any such, in the order set forth in ss. 224-237. The property so distributed is hereinafter called the residue. Residuaries.

Sir. 12. "They begin with the persons entitled to shares . . . then they proceed to the residuary heirs by relation, and they are such as take what remains of the inheritance, after those who are entitled to shares; and if there be only residuaries, they take the whole property." The word translated "residuary heirs by relation" or "residuaries" is "*asabah*," which means simply "relatives."

The Residuaries here spoken of are those called in the Sirajiyyah (p. 12) "Residuary heirs by relation" to distinguish them from "Residuaries for special cause." But as the latter (being the emancipator or the emancipator's residuaries) have no place in Anglo-Muhammadan Law, no distinctive epithet is required for the former. Again, these "Residuaries by relation" are subdivided by the author of the Sirajiyyah (p. 23) into (1) the Residuary in his own right, (2) the Residuary in another's right, and (3) the Residuary together with another. "The Residuary in his own right" is defined as "every male in whose line of relation to the deceased no female enters." The females mentioned in the above classification are called "Residuaries in another's right," inasmuch as they only take as such in company with a male, being either Sharers or nothing if they stand alone; *e.g.* a daughter, a son's daughters, a full sister, or a consanguine sister; and a sister is said to be "a Residuary together with another" when she takes together with a daughter, in the contingency described in s. 233, *post*. The last description is misleading, because the daughter takes as Sharer, though the sister, who takes with her, does so as Residuary.

224. There are four classes of Residuaries, of which each in turn must be exhausted before any member of the next class can take anything[1]; namely: Four classes.

Class I. Sons and son's sons, h.l.s.

Daughters and son's daughters, h.l.s., when not Sharers.

Class II. Father [and true grandfather, h.h.s.].

Class III. Brothers and Brothers' sons, h.l.s., full or consanguine.

Sisters, full and consanguine, when not Sharers.

Class IV. Sons and son's sons, h.l.s., of true grandfathers h.h.s.; in other words, paternal uncles, great-uncles, &c., and their male descendants in the male line.[2]

[1] There will be a slight exception to this proposition in Class II if the view of Abu Yusuf and Muhammad is preferred to that of Abu Hanifa with respect to the Residuary rights of the true grandfather. See under s. 229, *post*. Indeed, the adoption of their view would practically be equivalent to omitting the words in brackets and relegating the true grandfather to Class III of Residuaries; but the Sirajiyyah does not put the matter in that way.

[2] Sir. 24, gives the effect of this whole section, so far as relates to "Residuaries in their own right." As to female Residuaries, see below.

Class I of Residuaries. Sons and daughters.

225. The residue devolves in the first instance on the son or sons,[1] together with the daughter or daughters, if any. The sons, if more than one, share equally,[2] but each daughter takes only half the share of each son.[3]

Illustration.[4]

The heirs of a deceased Mussulman being a widow, a son, a daughter, and two brothers, the estate will be divided into twenty-four parts, of which the widow will take one-eighth, or three : the son, fourteen : and the daughter, seven parts ; the brothers taking nothing.

[1] Sir. 23. "The offspring of the deceased are his sons first."

[2] That the shares are equal is not expressly stated, but follows from the absence of any rule of inequality ; and see Macn. Prec. Inh. Cases 1, 49. Nevertheless there are instances of a custom of strict primogeniture, in a Muhammadan family, being recognised by the Courts : *Mahomed Akul Beg*, 25 W. R., 199 (1876) (Calcutta High Court) ; *Ibrahim Ali Khan* (Privy Council, on appeal from the Punjab), 39 Cal., 711 (1911) ; the latter case related to the Kunjpura estate (Rohilla Pathan family of Yusufzai origin) ; it was originally a State, with civil and criminal jurisdiction, which was withdr n in 1849 ; it was held that the custom of primogeniture governed the succession not only to the land which formed the state prior to 1849, but also to the acquisitions made by the chiefs since and the Oudh Estates Act, I of 1869, lays down a similar rule for the taluqdars of that province. If there is a custom to exclude daughters, the daughters should be treated as non-existent, for the purpose of calculating the shares of inheritance ; *Muhammad Kamil*, L. R., 36 I. A., 210 (1908). See notes to s. 212 above.

[3] Sir. 18. "If there be a son, the male has the share of two females, and he makes them Residuaries." This rule rests directly upon the Koran, iv, 11. "God hath thus commanded you concerning your children ; a male shall have as much as the share of two females." Except this verse and the corresponding one respecting brothers and sisters, the Koran has nothing about the rights of Residuaries, whence it was naturally inferred that Pre-Islamite usage was in other respects to remain unaltered.

[4] Macn. Dig. Inh. 21 (1803). See also Prec. Inh. Cases 44, 50, 51.

Sons' sons, and sons' daughters.

226. In default of sons, the residue devolves on the sons of deceased sons, sharing equally among themselves without reference to the shares which their respective fathers would have taken had they survived and sharing with sons' daughters, if any, in the proportion of two to one. In default of sons' sons, the residue devolves on sons' sons' sons and so on how low soever, the nearer degree in each case excluding the more remote, and females in each degree taking severally half as much as each male in the same degree.[1]

Illustration.

A person dies, leaving two daughters, a son's son, and a daughter of a son. Under these circumstances, after providing with moderation for the funeral expenses of the

deceased, after the liquidation of his debts, and the payment of his legacies to the extent of a third of the estate, the remainder will be made into nine shares, of which the daughters will receive two-thirds, or three shares each, as Sharers : the son's two shares, and the son's daughter one, as Residuaries.[2]

[1] Sir. 23. "The offspring of the deceased are his sons first ; then their sons in how low a degree soever."

[2] Macn. Prec. Inh. Case 53.

In not allowing the son of a deceased son either to share with his uncles or to take the whole share of his father in competition with two or more grandsons belonging to another branch, the Muhammadan Law differs from the Roman and all related systems, and also from the Hindu Law. The fact that the Prophet himself was a sufferer by this peculiar rule renders it the more remarkable that he did not venture to abrogate it. The point was, however, still unsettled among the Teutonic communities down to the tenth century A.D., if we may rely on a curious story told by the Saxon annalist, Widukind, as quoted in Jenks's "Law and Politics in the Middle Ages" (p. 9). He tells us that the question was raised before Otto the Great of Germany, whether the children of a deceased person ought to share in the inheritance of their grandfather, along with their uncles. "It was proposed that the matter should be examined by a general assembly convoked for the purpose. But the king was unwilling that a question concerning the difference of laws should be settled by an appeal to numbers. So he ordered a battle by champions ; and, victory declaring itself for the party which represented the claims of the grandchildren, the law was solemnly declared in that sense."

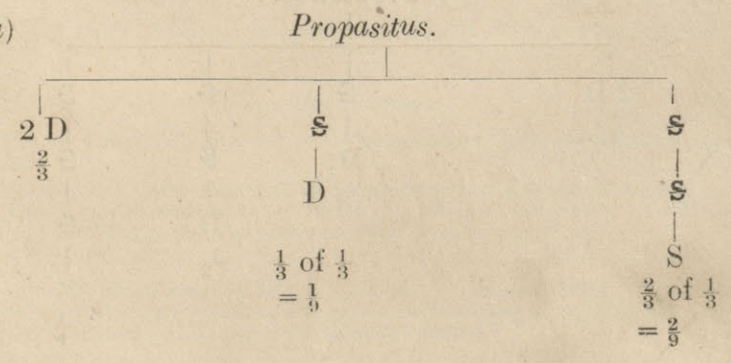
Down to 1853, the Scotch Law refused to admit the principle of representation as regards movables, except in the single case of competition between collaterals of the full-blood and the half-blood ; and neither the modern Scotch nor the English Law extends it beyond the descendants of brothers and sisters. See Erskine's "Principles of the Law of Scotland," 14th edit. (1870), p. 498.

227. In one case a female descendant in a nearer degree will divide the residue in the above-mentioned proportion with a male descendant in a lower degree ; namely, where a son's daughter, or son's son's (h.l.s.) daughter, as the case may be, is unable to take anything as Sharer, owing to the presence of two or more daughters or nearer son's daughters and there is no male descendant in the same degree with herself.

Son's daughter with lower son's son.

Illustrations.

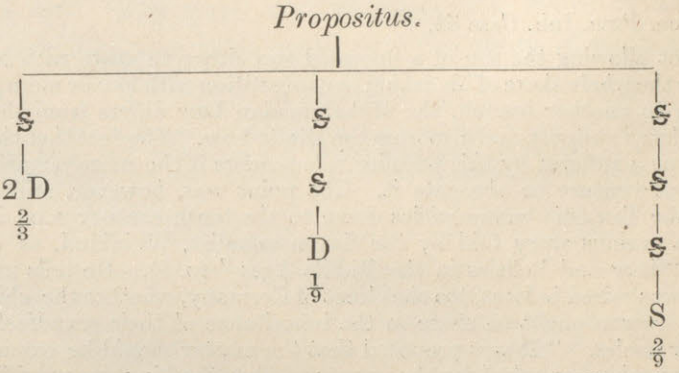
(*a*)



D stands for daughter, S for son ; the letters crossed through indicate descendants who have predeceased the Propositus.

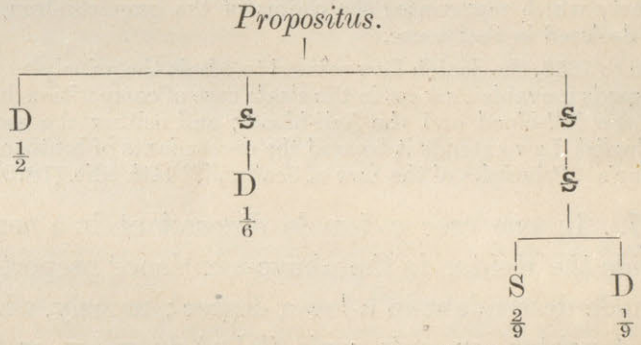
Here the two daughters exhaust the share assigned to two or more female children in the Koran, and there is nothing left for the son's daughter to take in her capacity as Sharer. If she stood alone, she would take nothing, but as she would by the ordinary rule be entitled to share in the usual proportion with a son's son as Residuary, it is considered that she should *à fortiori* share in that capacity with a "boy in a lower degree."

(*b*)



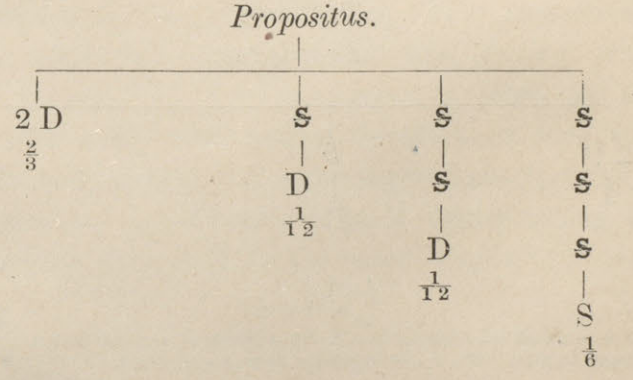
Here, in default of daughters, the two sons' daughters take the Koranic two-thirds, leaving the residue for the female in the third generation to share with the male in the fourth generation in the usual proportion of 1 to 2.

(*c*)



Here the one daughter takes the share assigned by the Koran to one female child the son's daughter takes the remainder of the collective female children's share, and the residue is shared in the usual proportion between the son's son's son and the son's son's daughter. It is quite immaterial whether the son's son's son and the son's son's daughter trace their descent from the Propositus through the same line or through different lines, so long as all the intermediate persons are males. Of course, if there were two son's son's daughters, they would each take one-fourth of the residue, leaving the other half (*i. e.* 1/6) for the son's son's son.

(*d*)



Here the two daughters take the Koranic two-thirds as before, and the residue is divided among the three other descendants, the male taking the double share, though he is the remotest of them all [and the females sharing alike, though they are in different generations].

See Sir. 19, where the points of all the above illustrations are covered by one comprehensive table, called " the case of *tashbib*," * including descendant in the sixth degree from the *propositus*.

I have enclosed the concluding portion of the explanation of the last illustration in brackets, in order to draw attention to its anomalous character, and to suggest inquiry whether it really represents the deliberate intention of the Hanafi lawyers. It constitutes, in fact, the solitary exception, throughout the whole range of their scheme of inheritance, to the rule that among claimants of the same description the nearer degree excludes the more remote. The succession of a male in a lower generation, together with females in a higher, is, of course, not an exception, because he is not a claimant of the same description; his title as Residuary is one which no female descendant can possess, except by conjunction with a male. But that females in different generations should be equalised with each other, merely because they are all potentially equalised with a male in a still lower degree, is a different matter.

Class II of Residuaries. Father.

228. In default of Residuaries of the first class the residue devolves on the father.

Sir. 24, continuing the passage quoted under s. 226. " Then comes the root, that is his father." See also Macn. Prec. Inh., Case 61 (father excludes brother).

Conflict as to rights of true grandfather.

229. If the father be dead, according to some authorities it devolves in its entirety on the nearest true grandfather, irrespective of the existence or non-existence of brothers and sisters[1]; but according to other authorities, a true grandfather in competition with full or consanguine (but not uterine[2]) brothers or sisters is put to his election either—

(1) To content himself with the one-sixth to which he is entitled as Sharer; or

(2) To forego his right in that character and to take as Residuary whatever in the circumstances he would have taken had he been a full brother; or

(3) To take instead thereof one-third of the residue.[3]

Illustrations.

(*a*) The surviving relations are: true grandfather, true grandmother, daughter, two brothers.

Here, inasmuch as the shares of the grandmother and daughter together make up $\frac{2}{3}$, if the grandfather chooses either the second or the third alternative he will have only $\frac{1}{3}$ of $\frac{1}{3} = \frac{1}{9}$. It will therefore be better for him to take $\frac{1}{6}$ as Sharer.

* So called by the Arabian writers, according to Sir William Jones, " because in their opinion it sharpens the understanding and captivates the fancy as much as the composition of an elegant love poem, which the word literally signifies."

(*b*) The surviving relatives of a woman are: her husband, a true grandfather, and one brother.

Here, the share of the husband being one-half, the residue is also one-half, and the grandfather will by the second alternative obtain $\frac{1}{2}$ of $\frac{1}{2} = \frac{1}{4}$, which is better than the $\frac{1}{6}$ which would accrue to him under the first or third alternative.

(*c*) The surviving relatives are: a true grandfather, a true grandmother, two brothers, and a full sister.

Here, as the grandmother's share is $\frac{1}{6}$, the residue, if the grandfather foregoes the $\frac{1}{6}$ which he might take as Sharer, will be $\frac{5}{6}$. If he chooses the second alternative, since the sister with brothers is a Residuary, taking half as much as each of them (s. 233, post), the residue must be divided by seven, so as to give three double shares and one single share, and his portion will be $\frac{3}{7}$ of $\frac{5}{6} = \frac{5}{21}$. By the third alternative he will have $\frac{1}{2}$ of $\frac{1}{6} = \frac{3}{18}$, which will be better than either $\frac{5}{21}$ or $\frac{1}{6} = \frac{3}{18}$.

[1] Sir. 21. "Brothers and sisters by the same father and mother, and by the same father only, are all excluded . . . *even by the grandfather*, according to Abu Hanifah, on whom be the mercy of Almighty God!"

[2] Sir. 17. "The mother's children are excluded by [children of the deceased and by son's children, how low soever, as well as by the father and] *grandfather, as all the learned agree.*"

[3] Sir. 40. "On the division of the paternal grandfather." From this passage it appears that the authorities for and against the right of the grandfather to exclude all brothers and sisters stand thus:—

For:
(1) Abu Bakr, the first Caliph.
(2) Abu Hanifa.
(3) The practice of Hanafi tribunals at the date of the Sirajiyyah. "This is also the decision of A.H., and *judgments are given conformably to it.*"

Against:
(1) Zaid, the son of Thabit, the editor of the Koran.
(2) Abu Yusuf.
(3) Muhammad.
(4) Malik } the founders of the second and third Sunni schools.
(5) Shafei }

The balance is thus as nearly even as possible. Sir William Jones, however, says, in his commentary on the Sirajiyyah, that "the dispute is now settled among the Sunnis, according to the opinion of Abu Hanifa; and the chapter on *division* seems to have been inserted merely from respect to Abu Yusuf and Muhammad, who dissented on this point from their master." But whether this statement is based on the Sharifiyah or on his own knowledge of modern practice, does not appear. He goes on to say that "the chapter will be useful to us if the question should arise in a family of Shiahs, who follow, no doubt, the opinions of Ali and Zaid." But this merely shows that Sir William had not given much attention to the Shia Law, which regulates on a wholly different, and much broader, principle the competition between ancestors and collaterals. See ss. 467 and 468, *post*.

The Egyptian Code has two contradictory pronouncements on this point. According to Art. 609 (3), the grandfather excludes the brothers, while according to Art. 597 they take concurrently with him.

The case of "Akdariyyah."

230. In one case, according to Zaid and those who follow him, a true grandfather is allowed to treat a competing inheritor first as a Sharer, and afterwards as a Residuary, in order to secure for himself a larger portion than he

could have under any of the three alternatives mentioned in the preceding section; namely, where the deceased was a woman, and the other inheritors are husband, mother, sister. In that case he is allowed first to reckon the sister as a Sharer which she would be if he himself elected to content himself with his one-sixth as Sharer, and then to divide with her the fraction produced by adding her original share to his own, in the proportion of two to one, that being the proper proportion when both are counted as Residuaries. But the share so obtained is subject to subsequent diminution by the process called "Increase."

Sir. 42. "The case is called *acdariyyah* because it occurred on the death of a woman belonging to the tribe of Acdar."

Another etymology is stated by Sir William Jones to be mentioned in the Sharifiyah without disapprobation, and to have occurred independently to himself, *viz.*, that it was so named because the rules of inheritance are *disturbed* by it in favour of the grandfather.

It will be found on working out the case that the composite share of the grandfather is, primarily, $\frac{2}{3}$ of $(\frac{1}{2} + \frac{1}{6}) = \frac{2}{3}$ of $\frac{2}{3} = \frac{4}{9} = \frac{8}{18}$; and that the other shares are—

Husband, $\frac{1}{2} = \frac{9}{18}$,

Mother, $\frac{1}{3} = \frac{6}{18}$,

Sister, $\frac{2}{9} = \frac{4}{18}$,

making up a total of $\frac{8+9+6+4}{18} = \frac{27}{18}$, so that by "increase" the grandfather's ultimate share is $\frac{8}{27}$.

By the ordinary rules he could not have obtained more than $\frac{1}{6}$, primarily, and this would have been reduced by increase to $\frac{1}{9} = \frac{3}{27}$.

231. In default of father or true grandfather, the residue devolves on the full brothers equally,[1] concurrently with the full sisters, if any, each sister taking half as much as each brother.[2]

Class III of Residuaries. Brothers and sisters.

[1] Sir. 24, line 11. "Then the offspring of his father or (in other words) his brothers." Macn. Prec. Inh. Cases 2, 26, 29, 35, 38, 83; Dig. Inh. 5 (1817).

[2] K. iv, 176. "And if there be several, both brothers and sisters, a male shall have as much as the portion of two females." See also Sir. 20, line 12; Macn. Prec. Inh. 37, 85, 86; Dig. Inh. 26 (1804), 34 (1816).

232. In default of full brothers, and subject to the exception stated in the next section, the residue devolves on the consanguine brothers equally, concurrently with the consanguine sisters, if any, each consanguine sister taking half as much as each consanguine brother.

Consanguine ditto.

Sir. 24. It must be remembered that, in order to ascertain the residue in this case, the "shares" of full sisters, and of uterine brothers or sisters, if any, must be deducted (Macn. Prec. Inh. 26 (1), 30).

Thus, if there be full sister, uterine brother and sister, consanguine brother and sister, the full sister will take $\frac{1}{2}$, the uterine brother and sister $\frac{1}{6}$ each, leaving only $\frac{1}{6}$ as residue, so that the consanguine brother will have $\frac{1}{9}$, and the consanguine sister $\frac{1}{18}$ only.

Sister with daughter, a Residuary.

233. If there be no Residuaries of the first or second class and no brothers, but daughters or son's daughters whose existence will prevent sisters (full or consanguine) from taking as Sharers, such sisters or sister will take the residue, if any, in preference to brothers' sons or any remoter paternal relatives. In this, as in other cases, if there be competition between full and consanguine sisters, the former will exclude the latter.

Sir. 20. "And they take the residue, when they are with daughters, or with son's daughters, according to the saying of Him, on whom be blessing and peace, '*Make sisters, with daughters, Residuaries.*'" See also Sir. 21, as to consanguine sisters.

This is the one exception to the general rule that no "female is primarily a Residuary," but can only become such by conjunction with a male.

See *Meherjan*, 24 Bom., 112 (1899); also Macn. Prec. Inh., Case 33.

Brother's sons.

234. If there be no full or consanguine brother, and no sister taking as Residuary under the preceding rule, the residue devolves on the sons of full brothers, who will divide it equally among themselves, whether they claim through the same or through different fathers.[1]

Neither brother's daughters, nor sister's children, nor sons of uterine brothers, can take as Residuaries.[2]

[1] Sir. 24, line 13. "Then their (the brothers') sons, how low soever." Macn. Prec. Inh. Cases 24, 43; Dig. Inh. 6, 35, 36 (1820).

[2] See the enumeration of "Distant Kindred," Sir 44, 45.

Sons of consanguine brothers.

235. If there be no sons of full brothers, the residue devolves on the sons of consanguine brothers, equally.

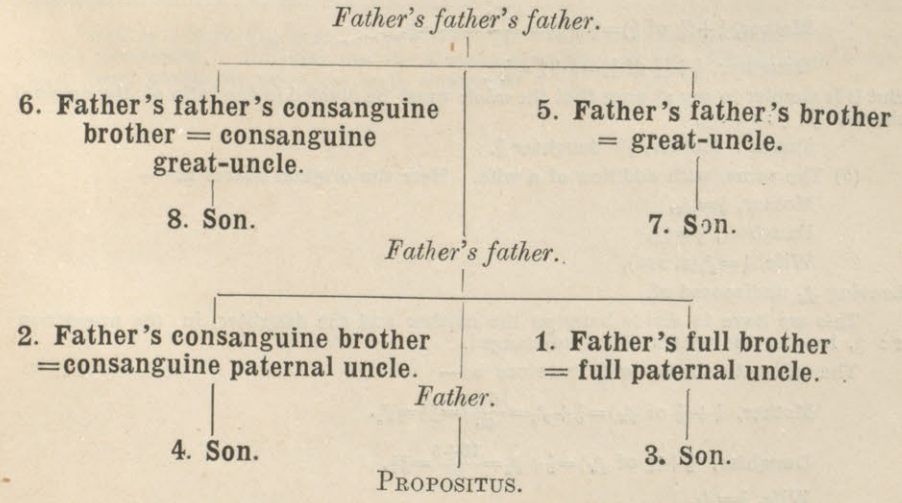
Sir. 24, line 14. "Then the strength of consanguinity prevails. I mean, he who has two relations is preferable to him who has only one relation, whether it be male or female, according to the saying of Him, upon whom be peace!—'Surely kinsmen by the same father and mother shall inherit before kinsmen by the same father only.'"

236. If there be no sons of brothers either full or consanguine, the residue devolves in like manner on brothers' sons' sons, h.l.s., the nearer degree always excluding the more remote, and the descendants of full brothers always excluding the descendants in the same degree of consanguine brothers. Remoter descendants of brothers.

Sir. 24, line 13, as above quoted (" how low soever "), and 25, line 2.

237. If there be no Residuaries of Class III, the residue devolves on the sons or sons' sons, h.l.s., of the nearest true grandfather (in other words, on the paternal uncles, great-uncles, or cousins of the Propositus), subject to the rules above stated as to (1) the preference of the nearer degree to the more remote, and as to (2) the relatives who have the same pair of common ancestors being preferred to the relatives in the same degree who have only a male ancestor in common. In default of such descendants of the nearest true grandfather, it devolves successively on the corresponding descendants of more remote true grandfathers, h.l.s. Class IV of Residuaries.

Illustration.



The three lineal ancestors being assumed to be dead, the order of succession is that indicated by the numerals.

Sir. 24. In *Mahomed Haneef*, 21 W. R., 371 (1874), a succession certificate under Act XXVII of 1860 was granted to a claimant whose paternal ancestor in the fifth degree was a paternal ancestor in the sixth degree of the deceased. See also Macn. Prec. Inh. Cases 32, 36; Dig. Inh. 3 (1805).

After the four classes of Residuaries by relationship, we come in pure Muhammadan Law to "Residuaries for special cause," *i.e.*, those who succeed to the property of a manumitted slave who dies leaving neither Sharer nor Residuary by relationship (Sir. 25); but these have no place in Anglo-Muhammadan Law, inasmuch as their rights depend upon the institution of slavery, which was abolished in British India as far back as 1843. That the effect of Act V of 1843 was not merely to abolish slavery itself, but to remove all legal disabilities resulting from previous slavery, and all rights of former masters to the inheritance of their freedmen or freedwomen, was only finally settled in 1879 by the Privy Council decision in the case of *Ujmuddin* v. *Zia-ul-Nissa*, 3 Bom., 422; s.c. L. R., 6 Ind. App., 137.

The Return.

238. If there are one or more Sharers, but no Residuaries the residue, if any, "returns" to the Sharer or Sharers, and is divided among them, if more than one, in the ratio of their respective shares.[1]

Exception.—The wife or husband of the deceased has no share in the Return as against "Distant Kindred,"[2] but may take the surplus rather than that it should escheat to the Government.[3]

Illustrations.

(*a*) A Moslem leaves a mother and a daughter. Hence the original shares are:—Mother, $\frac{1}{6}$ (s. 214); daughter, $\frac{1}{2}$ (s. 212). There is thus $\frac{1}{3}$ undisposed of, which must be divided between the mother and the daughter in the ratio $\frac{1}{6} : \frac{3}{6} :: 1 : 3$. Thus we have—

Mother, $\frac{1}{6}+(\frac{1}{4}$ of $\frac{1}{3})=\frac{1}{6}+\frac{1}{12}=\frac{2+1}{12}=\frac{3}{12}=\frac{1}{4}$,

Daughter, $\frac{1}{2}+(\frac{3}{4}$ of $\frac{1}{3})=\frac{1}{2}+\frac{1}{4}=\frac{3}{4}$.

But it is simpler to say at once that the *whole* must be divided in the ratio of the original shares, $\frac{1}{6} : \frac{3}{6} :: 1 : 3$,

Shares: Mother, $\frac{1}{4}$; daughter $\frac{3}{4}$.

(*b*) The same, with addition of a wife. Here the original shares are—

Mother, $\frac{1}{6}=\frac{4}{24}$,

Daughter, $\frac{1}{2}=\frac{12}{24}$,

Wife, $\frac{1}{8}=\frac{3}{24}$(s. 210),

Leaving $\frac{5}{24}$ undisposed of.

This we have to divide between the mother and the daughter, in the proportion 1 : 3, leaving the wife's share unchanged.

The ultimate shares will therefore be—

Mother, $\frac{1}{6}+(\frac{1}{4}$ of $\frac{5}{24})=\frac{1}{6}+\frac{5}{96}=\frac{16+5}{96}=\frac{21}{96}=\frac{7}{32}$.

Daughter, $\frac{1}{2}+(\frac{3}{4}$ of $\frac{5}{24})=\frac{1}{2}+\frac{5}{32}=\frac{16+5}{32}=\frac{21}{32}$,

Wife, $\frac{1}{8}=\frac{4}{32}$.

$\frac{7+21+4}{32}=\frac{32}{32}=1$

But here again it is simpler to say that there is $\frac{7}{8}$ to be divided between the mother and the daughter.

Mother, $\frac{1}{4}$ of $\frac{7}{8}=\frac{21}{32}$.

Daughter, $\frac{3}{4}$ of $\frac{7}{8}=\frac{21}{32}$,

Wife, $\frac{1}{8}=\frac{4}{32}$.

[1] Sir. 37; Macn. Prec. Inh. Cases 71, 73, 74; *Gujjadun Pershad*, 11 W. R., 220 (1869).

[2] Sir. as above; *Mahomed Noor Buksh*, 5 W. R., 23 (1866); *Koonari* v. *Dalim*, 11 Cal., 14 (1884).

[3] *Mahomed Arshad* v. *Sajida*, 3 Cal., 702 (1878); following *Soobhanee* v. *Bhetun*, 1 S. D. A., (1811), a case decided in accordance with the *fatwa* of the Maulawis, which was itself supported by the following quotation (at second hand) from the Hemadya.*

"There is no proper *Bytoolmal* (Baitul Mal see under s. 265) in our time; nor was there, except in the time of the companions of the Prophet and their successors. Cazee Imam Abdool Wahid, in his Furaiz (Book on Inheritance), had noticed that the surplus of the share of a husband or wife, whatever it might be, should not be placed in the Bytoolmal for the reason stated (*viz.*, the growing distrust of the management of that treasury), but should be given to the husband or wife."

For other authorities, see the Tagore Lectures for 1873, p. 233.

The principle of the Return is neatly illustrated by a story, said to be of Persian origin, which appeared in an English paper, about a wealthy Oriental, who, dying, left seventeen camels, to be divided as follows: His eldest son to have half, his second son a third, and his youngest a ninth. But how to divide camels into fractions? The three sons, in despair, consulted a *maulawi*. "Nothing easier," said the wise man. "I'll lend you another camel to make eighteen, and now divide them yourselves." The consequence was that each brother got from one-eighth of a camel to one-half more than his specified fraction of the whole, and the lawyer received his camel back again—the eldest brother getting nine camels, the second six, and the third two, being not actually the half, third, and ninth of the property bequeathed, but shares proportionate to those fractions.

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* Said in 1 Morl. Dig. ccxci, to be "a modern compilation, though its date is not precisely ascertained." Probably not the Hedaya translated by Mr. Hamilton, in which I have been unable to trace any such statement.

TABLE OF RESIDUARIES.

I. Descendants.

1. Sons, sharing with daughters, if any, in the proportion of two to one. As to brotherless daughters, see *Table of Sharers.*
2. Son's sons, sharing with son's daughters, if any, in the proportion aforesaid.
3. Son's son's sons, h.l.s., sharing in the aforesaid proportion with son's son's daughters of the same degree, and also with son's daughters or with son's son's daughters of higher degree, where the case is such that the latter would otherwise get nothing; but excluding both son's son's sons and son's son's daughters of a lower degree.

II. Ascendants.

1. Father.
2. True grandfather, h.h.s., the nearer degree excluding the more remote.

III. Nearer Collaterals.

(Descendants of Father.)

1. Full Brothers, sharing with full sisters, if any, in the proportion of two to one.
2. Consanguine Brothers, sharing in like manner with consanguine sisters, if any.
3. Full Sister *without* full brother or any nearer Residuary, and *with* one or more daughters or son's (h.l.s.) daughters,—if the residue is not exhausted by other Sharers.
4. Consanguine Sister *without* full or consanguine brother, or any nearer Residuary, and *with*, &c. (as above).
5. Full Brother's Sons, h.l.s., the nearer degree excluding the more remote.
6. Consanguine Brother's Sons, h.l.s.

IV. Descendants of True Grandfathers, h.h.s.

1. Full Paternal Uncle = son of nearest True Grandfather by the same mother as the Father of *propositus.*
2. Consanguine Paternal Uncle = Son of nearest True Grandfather, but *not* by the same mother as the Father of propositus.
3. Full Paternal Uncle's Son, h.l.s.; the nearer degree excluding the more remote.
4. Consanguine Paternal Uncle's Son, h.l.s.
5. Male descendants through males of more remote True Grandfathers *ad infinitum.*

THE DISTANT KINDRED.

239. If there be no Sharers or Residuaries, the heritable estate devolves upon the persons who are commonly referred to in English text-books as "Distant Kindred,"[1] but who are in fact *all those blood relations, whether near or distant, who are neither Sharers nor Residuaries.*[2] Definition.

[1] See p. 69, *ante.*

[2] Sir. 44. Macn. Dig. Inh. 47 (daughter's daughter's son).

240. The following order of priority holds good among "Distant Kindred," without any exception, each of the classes named being entirely exhausted before any member of the next class can succeed. Four classes.

1. Descendants.
2. Ascendants.
3. Descendants of parents.
4. Descendants h.l.s. of ascendants, h.h.s.

Sir. 45. The Sirajiyyah makes the fourth class consist exclusively of the children of grandparents; but inasmuch as the same work shows clearly that remoter blood relations may inherit as Distant Kindred, and therefore must be included in some class, I have ventured to disregard this limitation. In *Abdul Serang*, 29 Cal., 730 (1902), the claim was allowed of a person who was a great-grandson, *through his mother*, of a brother of a grandfather (whether paternal or maternal is not stated) of the deceased. The headnote omits the words here italicised, thus missing the whole point of the decision; for a great-grandson in the male line of a paternal grandfather would, of course, come in as a Residuary.

241. Among descendants who are Distant Kindred the rule applies without any exception that the nearer degree excludes the more remote. Hence a daughter's son or daughter's daughter will exclude all other Distant Kindred whomsoever. Class I. Nearer degree always preferred.

Sir. 47. For a supposed, but really irrelevant, Koranic authority, see Sura, xxxiii, 6, set out in Appendix D.

242. Among descendants in the third or any remoter generation, children of Sharers or Residuaries are preferred to the others. Hence, if there be a son's daughter's son or daughter, no child of a daughter's daughter can take anything. Children of "heirs" preferred.

Sir. 47.

The reason for this preference appears to be that the succession of Distant Kindred was long an open question, so that even in the school which ultimately admitted them it had long been customary not to apply to them the technical term "heirs" (*waris*). May one hazard the conjecture that there was a transition stage at which the children of "heirs" were admitted in default of heirs properly so called, while other Distant Kindred were excluded?

Doubt as to the application of the rule of the double share to the male.

243. Among descendants in the third or any remoter generation, all or none of whom are children of heirs, it is certain that in some sense males and females are to share in the proportion of two to one, but uncertain whether this rule is to be applied with exclusive reference to the sexes of the actual claimants, or also with reference to the sexes of the intermediate ancestors through whom they respectively claim.

Thus, it is certain that a daughter's son's son will take the larger share as against a daughter's son's daughter, but unsettled who will have the larger share as between daughter's daughter's son and daughter's son's daughter.

Sir. 47, 48. The opinion that the sexes of the actual claimants should alone be considered is that of Abu Yusuf. The other opinion is that of Muhammad, and is said to be the more generally received of the two traditions from Abu Hanifa. In Baillie's Moohummudan Law of Inheritance, p. 92, it is stated broadly, on the authority of the Sharifiyah, that Muhammad's opinion has been adopted by the followers of Abu Hanifa, as the rule of decision. On the other hand, the Fatawa Alamgiri, as translated or paraphrased in Baillie's Digest, p. 707, declares no preference for either opinion, but mentions that "the Imam Asbeejanee has given the preference to the opinion of Abu Yusuf, as being of easier application, and the author of the Moheet and the Sheikhs of Bookhara have also adopted it in this class of cases."

If the difference of opinion applied only to this class of Distant Kindred, it would be hardly worth while to examine the somewhat complicated details of Muhammad's system, because the only contingency in which it could become applicable, even if the Courts should be disposed to prefer it to that of Abu Yusuf, is so extremely remote. Even if the remarkable statement already quoted from the Hedaya (p. 128, *ante*), that it frequently happens that a man is a grandfather at the age of twenty-five, could be supposed to hold good in British India, where recent legislation has placed considerable obstacles in the way of precocious cohabitation, it would still require an extraordinary combination of accidents to sweep off all a man's children and grandchildren in his lifetime, leaving three or more great-grandchildren, all descendants of daughters, but connected with the deceased through grandchildren of different sexes, to dispute for the inheritance of their great-grandfather. But inasmuch as the same principles apply to the descendants of brothers and sisters or of uncles and aunts, among whom such competitions are more easily conceivable, though they do not appear to have ever come before any Indian Court, and it is difficult to say which rule of decision will be followed if ever they do arise, it seems necessary to inflict both upon the reader. It is suggested that Abu Yusuf's

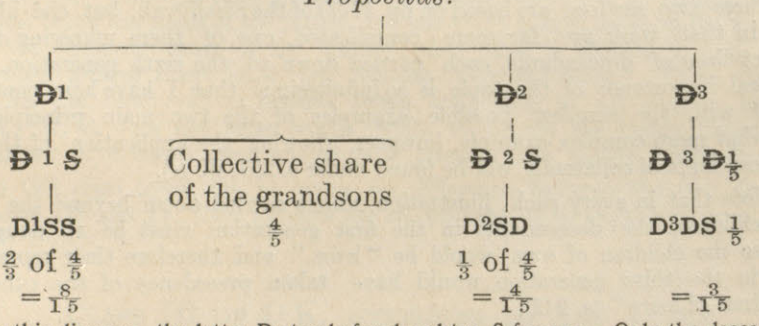
opinion should be adopted, both because it is more reasonable in itself on account of its simplicity and because it has a considerable weight of authority behind it, as noted in the Fatawa-i-Alamgiri.

MUHAMMAD'S SYSTEM.

244. According to the system of the jurist Muhammad, whenever, in tracing the lines of descent from the deceased to the several persons claiming to inherit as Distant Kindred, we come to an intermediate generation, or degree, in which the persons to be taken account of are not all of the same sex, but there are two or more of one sex and one or more of the other sex, the members of each sex in that degree are regarded as forming a separate group, and the collective share of each group is divided among the descendants of members of that group only, according to the rule of the double share to the male.

Sex-grouping of intermediate descendants.

Illustration.



In this diagram, the letter D stands for daughter, S for son. Only the descendants in the third generation are supposed to have survived the *propositus*.

In the first degree of descent we have three daughters, in the second degree two males and one female, whose shares, had they lived to inherit, would have been, by the usual rule, males, $\frac{2}{5}$ each ; female, $\frac{1}{5}$. The collective share of the grandsons is therefore $\frac{4}{5}$.

The descendants in the third degree are : a male descended from one of the grandsons, a female descended from the other grandson, and a male descended from the granddaughter ; and these three are supposed to be the actual claimants.

The two first take the collective share of the grandsons, *i.e.*, $\frac{4}{5}$, and divide it in the usual proportion, the male taking $\frac{2}{3}$ of it, and the female $\frac{1}{3}$. The son of the granddaughter takes his mother's share, *i.e.*, $\frac{1}{5}$ of the whole, unchanged.

[According to Abu Yusuf, the distribution would be : D¹SS, $\frac{2}{5}$; D² SD, $\frac{1}{5}$; D³DS, $\frac{2}{5}$.]

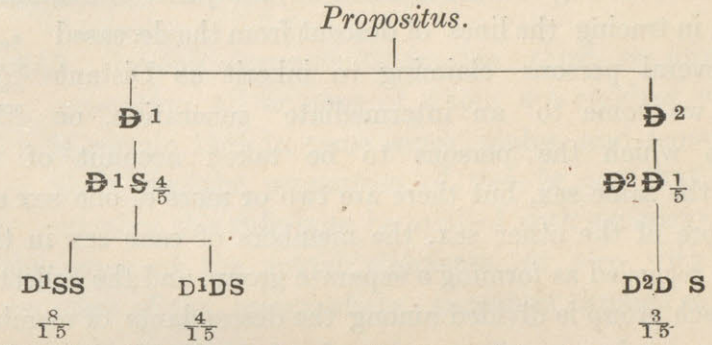
See note to the next section.

245. In reckoning the collective share to be attributed to deceased persons of the same sex in any intermediate generation in which the sexes differ, any person who happens to be the progenitor of two or more of the actual claimants must be credited with the share which would

Rule where two or more claim through the same intermediate descendant.

have been assigned to that number of persons of his own sex; and the multiplication must be repeated as often as the occasions for sex-grouping recur.

Illustration.



Here the male in the second generation is counted as two males, on the strength of his two descendants, in spite of the fact that one of them is a female. The result is to bring about the same distribution among the actual claimants, whether each is connected with the *propositus* through a distinct line of intermediate ancestors, or two or more through the same intermediate ancestors, as here.

These two sections are based on pp. 47-50 of the Sirajiyyah, but the illustrations in that work are far more complicated, one of them involving twelve distinct lines of descendants, each carried down to the sixth generation. The practical importance of the topic is so infinitesimal that I have here contented myself with the simplest possible examples of the two main principles. A somewhat more complex example, however, showing the application of the rule to descendants of collaterals, will be found under s. 257, ill. (*e*).

Note that in every such illustration, unless carried down beyond the great-grandchildren, the descendants in the first generation must be all daughters, because the children of sons would be "heirs," and therefore their representatives in the third generation would have taken precedence of the others as "children of heirs" (s. 242).

Class II of D. K. Mother's father.

246. If there be no Distant Kindred of the first class, the whole heritable estate will devolve upon the mother's father, as the only individual in the nearest degree of the second class of Distant Kindred.

Sir. 51. On the second class. "He among them who is preferred in the succession is the nearest of them to the deceased." See the Table in s. 213, *ante*.

Ancestors of "Sharers" preferred. Double share to paternal side.

247. If there be no mother's father, the property will be distributed between those "false grandparents" in the third degree who are connected with the deceased through a Sharer,[1] namely, the father of the father's mother and the father of the mother's mother. And of these, though they are both of the same sex, the former will take

two-thirds as belonging to the paternal side, the latter only one-third.[2]

[1] Sir. 51, where it should be noted that "related through an heir" must mean, "related through a Sharer," because a great-grandparent related to the deceased through a mere Residuary, that is, through a true grandfather, must be a true grandfather or true grandmother.

The Sirajiyyah admits that there were some lawyers who allowed no preference to ancestors related through heirs.

[2] See note 2 to the next section.

248. In default of the relatives last mentioned, the property will be distributed between the remaining false grandparents[1] in the third degree, namely, the father and mother of the mother's father, of whom the former will take two-thirds, the latter one-third.[2]

Other "false grandparents."

[1] As to these, see s. 218, *ante*.

[2] Sir. 52. "And if their relation differ, then two-thirds go to the father's side, that being the share of the father, and one-third goes to those on the mother's side, that being the share of the mother; then what is allotted to each set is distributed among them, as if their relation were the same." These rules are stated in the Sirajiyyah in general terms applicable to all degrees, however remote; but it does not seem worth while to discuss the highly improbable contingency of a competition among false grandparents in the fourth degree.

In this class there was no room for difference between the two disciples. In Classes III and IV, their systems are so different as to require separate treatment.

Class III of D.K. according to Abu Yusuf.

249. If there are no Sharers or Residuaries, and no Distant Kindred of the first or second class, the heritable estate devolves upon the daughters of full brothers and sons and daughters of full sisters, being divided according to the rule of the double share to the male, and equally among those of the same sex, whether they happen to be connected with the deceased through the same or through different brothers and sisters, or some through brothers and others through sisters.

Nephews and nieces.

250. If there be no children of full brothers or sisters the estate is divided in like manner among the children of consanguine brothers or sisters, but if there be none such, then among the children of uterine brothers or sisters.

Consanguine and uterine ditto.

Brother's son's daughters.

251. If there be no children of any description of brothers or sisters, the estate devolves upon the daughters of full brother's sons, taking equally without reference to the stocks.

Consanguine ditto.

252. Next to the daughters of full brother's sons come the daughters of consanguine brother's sons.

Other great-nephews and great-niece; (1) full blood, (2) consanguine.

253. Next to the daughters of consanguine brother's sons come the other grandchildren of full brothers or sisters; that is to say, the daughters of brother's daughters, or sons or daughters of sister's sons, or of sister's daughters, with no distinction except that of the double share to the male, and next to these the corresponding grandchildren of consanguine brothers or sisters.

Sir. 52-55. The ground on which the inheritors mentioned in ss. 251, 252, are preferred to those mentioned in s. 253 is, that (among those equal in degree) "the child of a Residuary is preferred to the child of a more distant kinsman"; just as, in the first class, the children of son's daughters were preferred to those great-grandchildren whose parents were neither Sharers nor Residuaries.

Uterine ditto

254. If there be no grandchildren of full or consanguine brothers and sisters, the estate devolves upon the grandchildren of uterine brothers or sisters, and is distributed equally among those of the same sex, but subject to the general rule of the double share to the male.

Remoter degrees.

255. The succession of remoter descendants of brothers and sisters is governed by the same principles as those applied in the four preceding sections; namely, that—

1. The nearer degree entirely excludes the more remote;
2. Children of Residuaries are preferred to children of Distant Kindred;
3. Subject to the preceding rule, full-blood relations are preferred to consanguine, and consanguine to uterine.

Sir. as above.

CLASS III OF D.K. ACCORDING TO MUHAMMAD.

256. (1) If there are children of uterine brothers or sisters, together with children of full or consanguine brothers or sisters, the former will take collectively the one-third which would have been the collective Koranic share of their parents, and will then divide it equally among themselves, without distinction of sex. And this collective share will be the same (namely, one-third), if they are all children of one brother and sister, their common parent being counted as two or more persons on the principle stated in s. 245. If the single uterine brother or sister has left only a single child, that child, whether son or daughter, will take the parent's ordinary share; namely, one-sixth. Nephews and nieces.

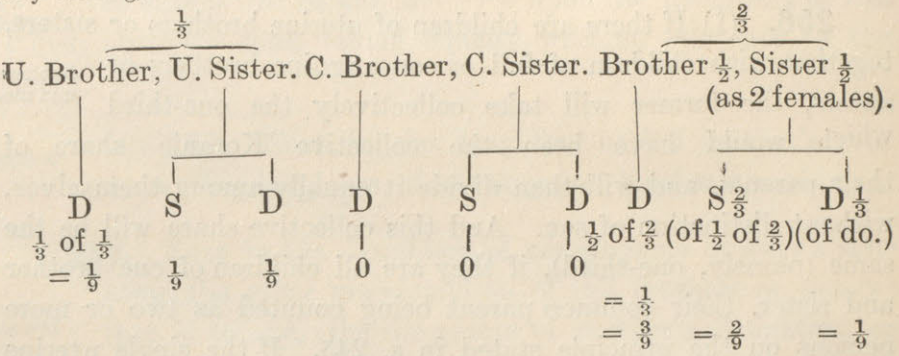
(2) Children of full brother or sister inherit collectively whatever their parents, if living, would have taken either as Sharers or as Residuaries; that is, they will have to leave one-sixth or one-third, as the case may be, for the child or children of uterine brothers or sisters, if any, but they will exclude, wholly or partially according to circumstances, the children of consanguine brothers or sisters; and they will share among themselves their collective portion according to the system of representation and sex-grouping described in sections 244 and 245.[1]

(3) Failing children of full brothers and sisters, or in so far as their portions, together with those of the children of uterine brothers or sisters, do not exhaust the estate, there is a precisely similar distribution among the children of consanguine brothers and sisters.[2]

(4) Where the principle of the Return (s. 238) would have applied in favour of brotherless sisters and uterine brothers, it will also apply in favour of their children to the exclusion of all remoter Distant Kindred.[3]

Explanation.—In applying ss. 244 and 245 to the cases arising under this section, it must be understood that the word "intermediate" refers to the line of descent from the common ancestor through whom the relationship with the deceased has to be traced.

[1] The following illustration is taken direct from the Sirajiyyah, p. 54, only altering, for the sake of clearness, the form of the diagram.



All in the first line are supposed to be dead. All in the second line are "children of heirs."

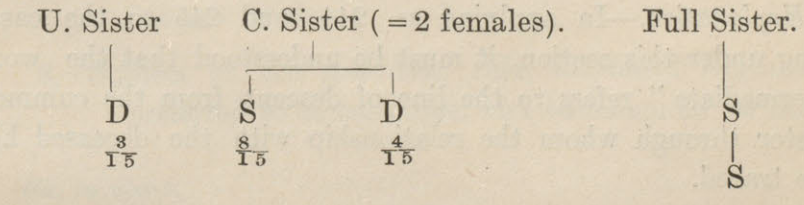
Here each dead sister counts as two females in virtue of her two children, and is thus raised to an equality with her brother, and the half so credited to her is apportioned between her son and daughter, according to sex. But Muhammad refuses to apply the rule of "the double share to the male" to the children of the uterine brother and sister, on the ground that according to the Koran it does not apply to their parents.

By Abu Yusuf's system (s. 250), the uterine relations would take nothing except on failure of the full and consanguine, in which case the whole would be divided among them, not equally, but according to sex. The distribution will be the same, if for one child of a uterine brother and two children of a uterine sister we substitute three children of one uterine brother or sister.

[2] If the right-hand group (children of full brother and full sister) be deleted, the whole of their two-thirds will be distributed in like manner among the corresponding children of the consanguine brother and sister. If, on the other hand, the right-hand group be merely modified by deletion of the full brother and his daughter, and by giving only one child to the full sister, the exclusion of the consanguine group by that one child will be only partial, and they will take the undisposed of $\frac{1}{6}$ which would have gone to their parents in like circumstances.

Again, suppose the left-hand group reduced to one child of one uterine brother or sister, taking only $\frac{1}{6}$. Then, even if there be still the equivalent of two females in the right-hand group so as to entitle them to $\frac{2}{3}$ (provided that there be not with them any child of a full brother), there will be a sixth left for the consanguines. If there is with them a son of a full brother, he will, of course, be a Residuary (s. 234), and no question of D. K. succession can arise; and we have already seen that if, as in the diagram, there is with them a daughter of a full brother, the portions which she and they will inherit from their respective parents will be the portions of Residuaries, and in that capacity they will divide all that is not due to the uterine branch, namely, $\frac{5}{6}$.

[3] Suppose the claimants to be as shown in the second and third lines of the following diagram.



Here the one child of the uterine sister takes primarily $\frac{1}{6}$, while the son and daughter of the consanguine sister cause their deceased mother to count as two females, and take in her right, primarily, the $\frac{2}{3}$ which is the Koranic share in such cases. Then, rather than allow the remaining $\frac{1}{6}$ to go to the full sister's son's son, who though nearer in "strength of blood" is remoter in degree, the principle of the Return is applied so that the one uterine claimant takes $\frac{1}{5}$ instead of $\frac{1}{6}$, and the consanguines take collectively $\frac{4}{5}$ instead of $\frac{4}{6}$, which they divide as usual in the proportion of two to one. The Return will of course be equally applicable if we suppose two or more uterines, taking primarily one-third, with only one child of one consanguine sister, taking primarily $\frac{1}{2}$. But if we introduce even a single child of a consanguine brother, with or without children of consanguine sisters, the Residuary character of the parent or parents will prevent the application of the Return, and the consanguine group will take collectively all except the primary share of the uterine branch, $\frac{2}{3}$ therefore in the first case, $\frac{5}{6}$ in the second case.

257. The same principles govern the distribution of remoter descendants of brothers or sisters, but in subordination to the rule that children of "heirs" are preferred, as in Class I, to those who are not the children of heirs.

Great-nephews, &c. Children of heirs preferred.

Illustrations.

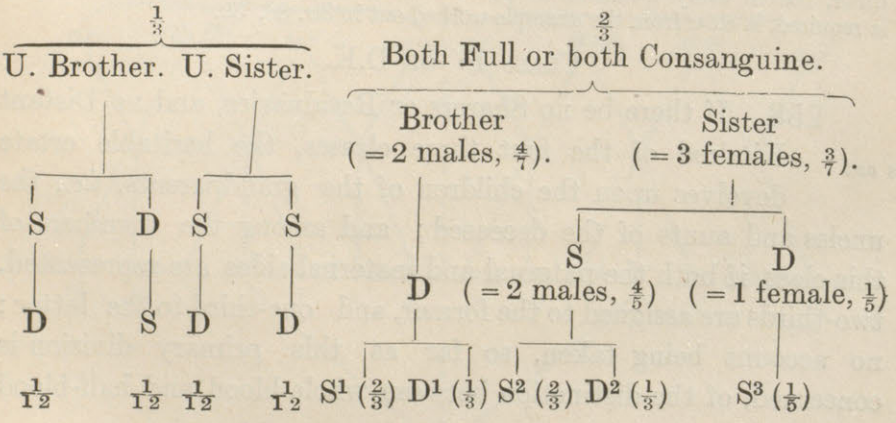
(*a*) Brother's son's daughter, either full or consanguine, is preferred (as a child of a Residuary) to a full sister's son's son or daughter's son, or to the son or daughter of a uterine brother's son.

(*b*) Full brother's son's daughter is preferred to consanguine brother's son's daughter, both being children of Residuaries, and the former being closer in blood.

(*c*) Full brother's daughter's daughter is preferred to consanguine brother's daughter's son, neither being child of a Residuary.

(*d*) Full sister's daughter's son or daughter shares equally with consanguine brother's daughter's son or daughter, in accordance with Muhammad's principle of representation, inasmuch as the sister herself would take her half as Sharer (s. 220), leaving the other half for the consanguine brother as Residuary (s. 232).

(*e*) The surviving relatives are those indicated in the lowest line of the following diagram :—



Here none are "children of heirs."

The grandchildren of the uterine brother and sister will divide $\frac{1}{3}$ of the whole equally, taking therefore $\frac{1}{12}$ each.

The remaining $\frac{2}{3}$ will be distributed among the grandchildren of the full or consanguine brother and sister as follows :—

S^1, $\frac{2}{3}$ of $\frac{4}{7}$ of $\frac{2}{3}$ $= \frac{16}{63}$.
D^1, $\frac{1}{3}$ of $\frac{4}{7}$ of $\frac{2}{3}$ $= \frac{8}{63}$.
S^2, $\frac{2}{3}$ of $\frac{4}{5}$ of $\frac{3}{7}$ of $\frac{2}{3}$ $= \frac{16}{105}$.
D^2, $\frac{1}{3}$ of $\frac{4}{5}$ of $\frac{3}{7}$ of $\frac{2}{3}$ $= \frac{8}{105}$.
S^3, $\frac{1}{5}$ of $\frac{3}{7}$ of $\frac{2}{3}$ $= \frac{2}{35}$.

Of the fractions thus obtained, it will be found that the least common denominator is 1260, and that in the distribution of the whole property the numerators will be :—

Four equal claimants on the uterine side, $4 \times 105 = 420$

and on the full or consanguine side

S^1, $\frac{16}{63}$; $16 \times 20 = 320$
D^1, $\frac{8}{63}$; $8 \times 20 = 160$
S^2, $\frac{16}{105}$; $16 \times 12 = 192$
D^2, $\frac{8}{105}$; $8 \times 12 = 96$
S^3, $\frac{2}{35}$; $2 \times 36 = 72$

1260

This section is based on Sir. 52-55, "On the Third Class." Illustration (*a*) is taken partly from the first, and partly from the last, of the illustrations there given ; the bracketed words being added, as clearly involved in the rule. Illustrations (*b*) and (*d*) are also taken direct from the Sirajiyyah, and (*c*) is inserted to draw attention to the fact that the distinction between the whole and the half-blood applies in the same way between claimants who are neither of them children of heirs as between claimants both of whom are in that category.

Illustration (*e*) is added to show the working, in this class, of Muhammad's system of partial representation. The brother is supposed to have only a daughter because a brother's son's children would be in a superior class, as child of a Residuary. The brother is counted, for the purpose of this calculation, as two males, that being the number of his descendants among the actual claimants ; and the sister, for the corresponding reason, counts as three females. Their shares are therefore respectively $\frac{4}{7}$ and $\frac{3}{7}$ (s. 245). The $\frac{4}{7}$ devolves entire upon the brother's daughter, and is divided among her children according to sex. The sister's $\frac{3}{7}$ is divided primarily between her son and daughter ; not however, simply according to the rule of the double share to the male, because we have again to take account of "the number of the branches." The sister's son counts as two males, the sister's daughter as only one female ; consequently the share of the former is put at $\frac{4}{5}$, of the latter at $\frac{1}{5}$, of their mother's $\frac{3}{7}$. That this rule has to be applied not only in the first generation in which the sexes differ, but in every intermediate generation in which a fresh grouping of sexes is required, is clear from the example worked out in Sir. 38, 39.

Class IV of D.K.

Uncles and aunts.

258. If there be no Sharers or Residuaries, and no Distant Kindred of the first three classes, the heritable estate devolves upon the children of the grandparents, *i.e.*, the uncles and aunts of the deceased ; and among the members of this class, if both the paternal and maternal sides are represented, two-thirds are assigned to the former, and one-third to the latter ; no account being taken, so far as this primary division is concerned, of the distinction between whole-blood and half-blood relationship.

Sir. 55, 56. "If the sides of their consanguinity be different, then no regard is paid to the strength of relation"

259. Among the uncles and aunts on the paternal and maternal sides, respectively, the order of priority is as follows :— Order of priority on each side.

I. Full sisters of the father or full brothers and sisters of the mother, as the case may be.

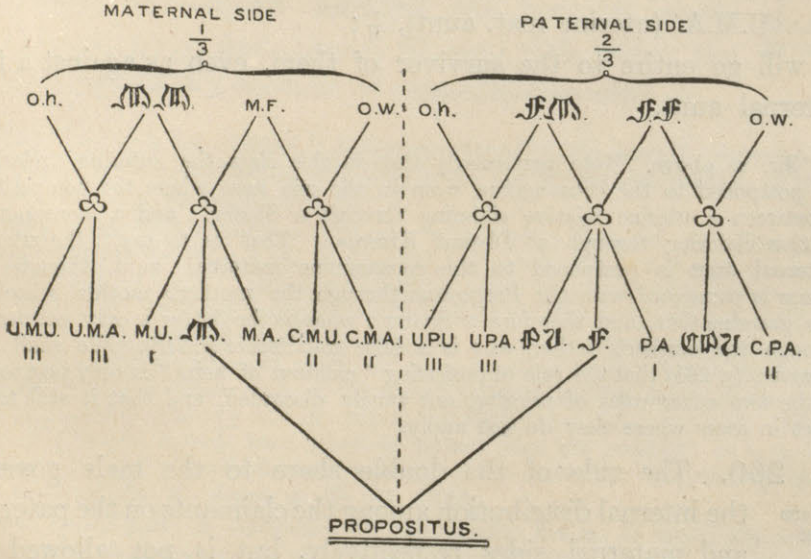
II. Consanguine ditto.

III. Uterine brothers and sisters of the father or mother, as the case may be.

In the following table all the possible kinds of D.K. uncles and aunts are indicated by plain capitals, as explained below, and are distinguished by the Roman numerals I, II, III, according to their priorities within the side of consanguinity (paternal or maternal) to which they belong. The persons distinguished by Old English capitals, *viz.* the parents, father's parents, and full and consanguine paternal uncles of the *propositus*, who would be Sharers or Residuaries, are dead.

The small letters o.h., o.w., stand for "other husband" and "other wife" respectively, who would (even if living) have no place in the scheme of succession, not being related by blood to the *propositus*.

Table of D.K. Uncles and Aunts.



I. P.A. (pat. aunt) takes the whole paternal portion, $\frac{2}{3} = \frac{6}{9}$ while the maternal portion is divided between

{M.U. (mat. uncle), $\frac{2}{3}$ of $\frac{1}{3} = \frac{2}{9}$, and
{M.A. (mat. aunt), $\frac{1}{3}$ of $\frac{1}{3} = \frac{1}{9}$.

Failing either of these, the other will take the whole maternal portion.

II. Failing P.A., C.P.A. (consanguine pat. aunt) takes the whole paternal portion, notwithstanding the existence of M.U. and M.A., full-blood relations in the same degree on the maternal side; and conversely, failing both M.U. and M.A., notwithstanding the existence of P.A. or C.P.A. or both, the maternal portion is divided between

{C.M.U. (consanguine mat. uncle), $\frac{2}{3}$ of $\frac{1}{3} = \frac{2}{9}$, and
{C.M.A. (consanguine mat. aunt), $\frac{1}{3}$ of $\frac{1}{3} = \frac{1}{9}$;

failing either of whom, the other will take the whole $\frac{3}{9}$.

III. If there are no full or consanguine paternal uncles or aunts, the paternal portion will be divided between

{U.P.U. (uterine pat. uncle), $\frac{2}{3}$ of $\frac{2}{3} = \frac{4}{9}$, and
{U.P.A. (uterine pat. aunt), $\frac{1}{3}$ of $\frac{2}{3} = \frac{2}{9}$;

and failing either of these will go entire to the other; and, similarly, if there be no full or consanguine maternal uncles or aunts, the maternal $\frac{1}{3}$ will be divided between

{U.M.U. (uterine mat. uncle), $\frac{2}{9}$, and
{U.M.A. (uterine mat. aunt), $\frac{1}{9}$;

or will go entire to the survivor of them, even as against a full paternal aunt.

Sir. as above. Note particularly that in this class the uterine relatives are postponed to the consanguine, even in the one case where the competition is between a uterine relative claiming through a Sharer, and a consanguine relative claiming through a Distant Kinsman. That is to say, the uterine maternal aunt is postponed to the consanguine maternal aunt, though the former is connected with the Propositus through the mother's mother, who is a true grandmother, and therefore a Sharer; whereas the latter is only connected through the mother's father, who is a false grandfather (s. 218). We shall see, however, (s. 261) that the rule of preferring "children of heirs" is only postponed to the two other rules of priority, not wholly discarded, and that it still takes effect in cases where they do not apply.

Double share to males of each side.

260. The rule of the double share to the male governs the internal distribution among the claimants on the paternal and maternal sides respectively, but is not allowed to

interfere with the primary distribution between the sides, so as to give a larger share to a maternal uncle than to a paternal aunt.

This and the two preceding sections hold good according to both Abu Yusuf and Muhammad.

Sir. 55. "When there are several, and the sides of their relation are the same, ... and if there be males and females and their relation be equal, then the male has the allotment of two females; as if there be a paternal uncle and aunt, both by one mother, or a maternal uncle and aunt, both by the same father and mother, or by the same mother only."

261. The remoter descendants of grandparents, and the descendants of remoter ancestors, succeed in the corresponding order, except that among relatives in the same degree, on the same side, and all full, all consanguine, or all uterine those claiming through "heirs" —*i.e.* Sharers or Residuaries— are preferred to those claiming through Distant Kindred. Remoter degrees.

As between claimants equal in all other respects, but connected with the common ancestor through persons differing in sex, Muhammad applies the rule of the double share to the male in the same manner as in Class I and Class III.

Sir. 56-58.

SUCCESSORS UNRELATED IN BLOOD.

262. If there be no persons entitled to inherit as Sharers, Residuaries, or Distant Kindred, the heritable estate will devolve upon that person (if any) with whom the deceased had made a contract of clientship (*mawalat*). Successor by contract.

The "successor by contract" is just mentioned in the general enumeration of heirs in the Introduction to the Sirajiyyah, but for an explanation of the phrase we must go to the Sharifiyah.

"If a person of unknown descent says to another, 'Thou art my kinsman, and shalt be my successor when I am dead, and thou shalt pay for me any fine and ransom to which I may become liable,' and if the other says, 'I accept,' then it is a valid contract according to our doctrine. The acceptor shall be the heir, he being the payor of the fine or ransom. If the other person also be one whose descent is unknown, and make the same proposal to the first mentioned, and if he accept it, then each of them shall be successor (by contract) to the other, and pay for him any fine or ransom to which he may become liable. The person of unknown descent may, however, retract from the contract, so long as the other does not pay the fine or ransom for the contractor" (quoted in the commentary of Sir W. Jones, p. 58, ed. 1792).

This is evidently an institution of Pre-Islamite Arabia, in which the only checks upon lawlessness were the two principles that (1) each tribe is collectively

responsible for homicides or other wrongs committed by any of its members, and that (2) he who has slain a fellow-tribesman unjustly must be put to death or expelled from the tribe.

In the latter case the expelled member might be killed by any man with impunity, and would find his only chance of self-preservation in being admitted into some other tribe. Since this would involve collective tribal responsibility for any subsequent offences on his part, it would not generally be allowed unless some existing member of the tribe undertook to be surety for him; and this obligation again would not be undertaken except on the understanding that the refugee would act the part of a faithful client towards his protector, and that the latter should have a claim to inherit the property of the former in preference to any one except the client's immediate family. (See Robertson Smith's "Kinship and Marriage in Early Arabia," p. 22.)

The Moslem conquests tended to remove the chief original reason for such arrangements, by breaking up the old tribal system of Arabia, and subjecting the Moslems, in most parts of the world, to regular governments organised on other models; but another reason was supplied by the frequent cases of conversion, when the new convert, cut off from his own kith and kin, needed some Moslem to stand sponsor for him, as it were, in respect of his liabilities under the law of Islam, which (it should be noted) still sanctioned, with some modifications, the old system of private family vengeance with the option of compensation. In fact, an example of this on a large scale took place at the very beginning of Islam, when those who fled from Mecca with, or after, the Prophet were received by the believers of Medina as brothers, and a tie of fictitious kinship was established between selected pairs of "Refugees" and "Helpers," which would, supposing that all the real blood relations of the Refugee persisted in their unbelief, have assured to the "Helper" thus associated with him a valuable right of inheritance, and conversely. It was with reference to such a contingency that the passage in chap. viii of the Koran, ver. 72, was revealed, putting the mere fact of remaining behind at Mecca on a level with unbelief for this purpose.

"Verily those who believe and have fled and fought strenuously with their wealth and persons in God's way, and those who have given refuge and help, these shall be next-of-kin to each other. But those who believe but have not fled, ye have naught to do with their claims of kindred until they flee as well."

Seeing that the Muhammadan system of pecuniary composition for homicide and other offences is no longer in force in British India, that converts to Muhammadanism have no need for any special sponsors, and that rights of inheritance are in general unaffected by change of religion, there seems to be no sufficient motive for entering into such a contract as that described in the Sharifiyah; and it would have to be worded somewhat differently in order to escape being held void for want of consideration. It will be seen (s. 264, *post*) that a kinless Moslem, wishing to leave all his property to a stranger in blood, can do so by an ordinary will.

Fictitiously acknowleged kinsman.

263. Next to the "Successor by Contract," if the existence of such an inheritor is still legally possible, or, if not next to the Distant Kindred, comes the *fictitiously acknowledged kinsman*.[1] That is to say, if a person chooses to acknowledge another of unknown parentage as his brother or his brother's son, there being no other evidence of the relationship,

the acknowledgment will have no effect as against actual blood relations of the same or even of a remoter degree; but if there are no relations in existence who could inherit,[2] it will operate as an admission binding the acknowledger himself, though not any other person and will therefore invalidate any bequest on his part, whether prior or subsequent, exceeding the legal third, unless the acknowledgee chooses to assent to it in his capacity of heir after the death of the testator.[3]

It will also oblige the acknowledger himself to share with the acknowledgee any portion coming to him by way of inheritance which he would have had to share with a real brother.[4]

[1] Sir. 13. "Then to him who was acknowledged as a kinsman through another, so as not to prove his consanguinity, provided the deceased persisted in that acknowledgment even till he died." The books speak only of an acknowledged kinsman *through another*, because, if a person acknowledges another as his own son, such an acknowledgment will, under ordinary circumstances, be accepted as conclusive evidence of actual sonship (s. 85).

[2] In *Sahebzadee Begum*, 12 W. R. 512 (1869),* the Court seems to have thought (though it was not necessary to decide) that an admission of brotherhood alleged to have been made by the deceased could not operate as an "acknowledgment of a kinsman through another," because the alleged acknowledger had a known heiress, namely, *his widow*. This could only be correct on the assumption that the widow takes the whole by "Return" as against all claimants inferior to Distant Kindred (or "successor by contract"); whereas all that has so far been decided even for Hanafi Law, and that with some hesitation, is that she takes precedence of the Government's title by escheat; and the case in question was one governed by Shia Law, which undoubtedly excludes the wife from the Return under all circumstances. See below, s. 452 (3).

[3] See s. 270, *post*

[4] Baillie, 405.

264. If there be no "acknowledged kinsman," and no inheritor of any of the other descriptions above mentioned, but the deceased has attempted to dispose by will of the whole, or of more than the generally bequeathable portion,[1] of the property, such a bequest will be allowed its full effect as against the only remaining competitor, namely, the Bait-ul-Mal[2] (see section following). Universal legatee.

[1] *I.e.* one-third. See s. 270.

[2] Sir. 13.

* S.c. on review *Himmat* v. *Shahebzadee Begum*, 14 W. R., 112, and 21 W. R. (P.C.), 113 (1873); also 13 B. L. R., 102, and L. R., Ind. App., 23.

265. In default of all the successors above mentioned, the whole property of a Muhammadan dying intestate would in a Muhammadan State go to the Bait-ul-mal.

Escheat to Government.

By pure Muhammadan Law (Sir. 3) it would lapse to a fund called in Arabic the Bait-ul-Mal (Treasury), applicable to purely Muhammadan purposes, such as war against the infidel, the building of mosques, or the sustentation of poor believers. But the British Courts have refused to recognise the existence of any such Treasury, and have decided in substance that property for which there is no other claimant must necessarily be applicable to the general purposes of the Government. The leading authority for this principle is a Hindu case, *Collector of Masulipatam* v. *Cavaly*, 8 Moo. I. A., 498 (1860) at p. 525; but inasmuch as it was applied there in the teeth of an express maxim of Hindu Law to the effect that the king shall in no case take the property of a Brahman, it must be applicable *à fortiori* to the case of Muhammadans, whose law contains no such maxim, but on the contrary expressly declares that the deposit in the Public Treasury *is not by way of inheritance* (Sharifiyah, 9, 10). The words of the Privy Council in that case were as follows: "When it is made out clearly that by the law applicable to the last owner there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all Courts of the country alike. Private ownership not existing, the State must be owner as ultimate lord."

The Muhammadan Law itself evidently contemplates that the Sultan or other representative of the State will be the administrator of the fund "for the benefit of all Moslems," * and a State which professes strict religious neutrality cannot do otherwise than substitute the formula "for the benefit of all Indo-British subjects."

NOTES—R. 1. I have left the above note as it was written by Sir Roland Wilson, except for the omission of a paragraph not bearing directly on the subject, although I do not agree with Sir Roland's opinion. In the first place I do not think that "Treasury" is a correct translation of Bait-ul-Mal. It is more a fund than the actual vaults of the treasury, and every expenditure which must be incurred in the interests of Moslems in general is a liability of that fund (Aghnides, 423) and on the other hand, there may be items of the public revenue of a state which are not part of the assets of this fund (*id.*, 424). In the second place the case of the *Collector of Masulipatam* v. *Cavalry*, cited above, decides nothing on the present question of Muhammadan Law. The case of the special privileges of a particular caste, the Brahmans, finds no analogy in Muhammadan Law. It is true that there is no Bait-ul-Mal at present in India, and in the circumstances, the property might possibly escheat to the non-Moslem Government of India as unclaimed. But the question is whether a local Moslem Community in British India is not competent to create and maintain such a fund in the interests of the Muhammadans, and whether, if such a fund existed (it would be a religious endowment), the courts would not decree the claim of the fund on such property in accordance with Muhammadan Law. There is no ruling on the subject so far, but it is submitted that, if the question arises, it can be decided equitably

* And we have seen (under s. 238) that even under a Muhammadan Government which did not happen to command the confidence of the professors of the Sacred Law, the latter would sometimes protest that "there is no proper Bait-ul-Mal," or that its claims should be cut down as far as possible, "owing to the growing distrust of the management of that Treasury."

only on the basis that the communal fund, where one exists, should be the final heir on the failure of all other heirs. The Shia Law on this subject makes the poor of the City the final heirs; see s. 413 A below.

SUCCESSION TO A BASTARD.

266. An illegitimate child is (as already stated, ss. 80, 89) considered to be the son of his mother only. As such he inherits from her and her relations, and they from him, subject, of course, to the claims of his own descendants, if any, and of his wife or wives—or of the husband, if the bastard in question happens to be a female.

Succession of, and to, a bastard.

Baillie, 411, 693.

GROUNDS OF EXCLUSION FROM INHERITANCE.

267. No person who has caused the death of another whether intentionally or by negligence or misadventure, can inherit from that other.

1. Having slain the propositus.

See under s. 269, *infra*.

268. An alien enemy of the British Government is incapable of inheriting the property of any British subject, Muhammadan or other, as he is incapable of asserting any other civil right.

2. Being an alien enemy.

The rule as here stated is in accordance with the law of England and with modern International Law, and has nothing specially Muhammadan about it. But in comparing it with the verbally identical Muhammadan rule as to the exclusion of *harbis* from inheriting property under a Muhammadan Government (either from believers or from protected infidels),* it must be remembered that, according to modern notions, not only is war regarded as a rare and brief interruption to the normal relations among civilised states, but even during the existence of a state of war the non-combatant subjects of each belligerent power who were resident in the territories of the other at the outbreak of hostilities are, more often than not, permitted to remain there on the footing of alien friends and enjoy in that case the same civil rights as in time of peace; *Casseres* v. *Bell*, 8 T. R, 166 (1799). Recent English legislation, however, has been in a restrictive direction, even before the outbreak of the Great War of 1914-18. See the Aliens Act 1905 (5 Edw. 7, c. 13), and the statutory Rules made thereunder. During the War the Aliens Restriction Act 1914 (4 and 5 Geo. 5, c. 12) gave very large restrictive powers to the Crown, which have been freely used in framing Aliens Restriction Orders in a variety of ways. It may be noted that this Act applies not only in a state of war, but on occasions of "imminent national danger" or "great emergency." The medieval Muhammadan lawyers contemplate

* See under next section.

hostility as the normal relation between Moslem and infidel Governments, broken only by occasional truces, and regard every non-Moslem as a *harbi* who is not either (1) a permanent tribute-paying subject of the former (*zimmi*), or (2) an alien protected by temporary permit, which ought not to be granted for more than a year.

No other ground.

269. No other grounds of exclusion from inheritance than those mentioned in the two preceding sections are recognised by Anglo-Muhammadan Law.

Sir. 3. Impediments to succession are four: (1) Servitude; (2) homicide, whether punishable by retaliation or expiable; (3) difference of religion; (4) difference of country.

The first impediment disappeared with the abolition of slavery in 1843 as was settled after some doubt by the Privy Council in *Ujmuddin Khan* v. *Zia-ul-Nisa*, 3 Bom., 422 (1879); s.c. L. R., 6 Ind. App., 137.

The second impediment remains, and is represented by s. 267, *supra*.

The third impediment was removed by Act XXI of 1850, which extended to the whole of British India the principle of s. 9 of Bengal Regulation Act of 1832; *Khunni Lal* v. *Gobind Krishna Narain*, 33 All., 356 (1911), at p. 365. The material words are as follows: "So much of any law or usage . . . as may be held in any way to impair or affect any right of inheritance [of any person] by reason of his or her renouncing, or having been excluded from, the communion of any religion . . . shall cease to be enforced as law." But for this enactment here would be no reciprocal rights of inheritance between a Muhammadan husband and a non-Muhammadan wife, even in the cases in which such unions are permitted by the law of Islam.

The fourth impediment is said by Baillie (Dig. 698, from the Fatawa Alamgiri) to apply only to unbelievers, not to Mussulmans, and to mean merely that a Moslem State will not recognise any relation of heirship between an infidel tributary to itself (Zimmi) and a subject of an infidel State. Obviously there is no room for any such rule in Anglo-Muhammadan Law, which is concerned only with Moslems living under a non-Muhammadan Government.

The paucity of these grounds of exclusion contrasts strikingly with their number and variety under Hindu Law, as to which see Mayne's "Hindu Law and Usage," chap. xix. It may have been the influence of the rival system that rendered it necessary for the Courts to lay down expressly, on at least two occasions, that mental derangement is not, by Muhammadan Law, a ground of exclusion from inheritance. See Macn. Prec. Inh. Case X, and *Mahar Ali*, 2 B. L. R., A. C., 306 (1869).

Missing and unborn heirs.

269A. (1) When, at the time of a succession opening, one who would, if living, be an heir, is missing, the portion belonging to him, or the whole if he is sole heir, must be reserved until he appears and claims it, or until he is known, or legally presumed, to be dead; the legal presumptions applicable being not those of Muhammadan Law, but those laid down in sections 107 and 108 of the Indian Evidence Act.[1]

(2) When, at the time of the opening of the succession, a woman is known to be pregnant whose expected offspring will or may, be entitled to inherit, the immediate distribution must be limited to such portions as the living heirs, if any, must in any case be respectively entitled to; and the remainder must be reserved until the delivery has taken place. The extent of the portion to be reserved will probably be determined according to modern estimates of the possible number of births from a single pregnancy, without reference to the conflicting opinions of Muhammadan jurists.[2]

[1] *Mazhar Ali*, 7 All., 297 (1884); followed by the P. C. in *Moolla Cassim*, 33 Cal., 173, and L. R., 32 Ind. App. 177 (1905). The rules of the Evidence Act are, substantially, that if there is no proof of the person having been alive within the last thirty years he is presumed to be dead, and that in any case he is presumed to be dead if he has not been heard of for the last seven years by those who would naturally have heard of him had he been alive.

[2] Sir. 60-64. The opinions there recorded range from that of Abu Hanifa, that the reserved portion should be that of four sons or four daughters, whichever is the largest,* to that of Abu Yusuf, that there should be reserved the portion of one son or one daughter. The former allowance seems unnecessarily large; the latter, according to which the Sirajiyyah tells us that "cases are decided and which is adopted in the Egyptian Code (Art. 631), errs in the opposite direction, making no provision for the common case of twins, and the, by no means, unknown case of triplets. The reasonable limit of three has the sanction of Muhammad. The Sirajiyyah also laid down that, if it is the widow of the deceased who is alleged to be pregnant by him, the result must be awaited for the full term of two years. But even if the Courts should be disposed (as suggested in s. 81) to allow this unscientific presumption when it is a question

* In the third edition it was erroneously stated that the aggregate portion actually received by four sons must always be greater than that of four daughters. The case was overlooked of the living inheritors being both parents and the pregnant widow, with no child of either sex. The shares of these inheritors are $\frac{1}{6}+\frac{1}{6}+\frac{1}{8}=\frac{11}{24}$, leaving a residue of only $\frac{13}{24}$ for four posthumous sons. But the collective share of four (or three, or two) daughters is $\frac{2}{3}=\frac{16}{24}$ (s. 212); and although this will have to be reduced by the doctrine of Increase (s. 222 to $\frac{16}{17}$, this is still larger than $\frac{13}{24}$. The only example fully worked out in the Sirajiyyah is, however, one in which the share actually received by four sons will be the larger, but the *chance* of four daughters being born instead of four sons will necessitate a larger provisional reserve than would have been required had there been no such alternative, owing to the uncertainty thereby introduced as to which of the other co-heirs will get the surplus. The living inheritors are father, mother, pregnant widow, daughter. Here

(1) *On the supposition that four sons are born*, there will be three Shares; father $\frac{1}{6}$, mother $\frac{1}{6}$, widow $\frac{1}{8}$, leaving a residue of $\frac{13}{24}$ to be divided among the the four new-born sons and the daughter, who will become, with them, a Residuary. The daughter will take $\frac{1}{9}$ of $\frac{13}{24}=\frac{13}{216}$; the sons collectively, $\frac{8}{9}$ of $\frac{13}{24}=\frac{104}{216}=\frac{13}{27}$.

(2) *On the supposition that four daughters are born*, these together with the pre-existing daughter will take, as their collective shares, primarily, $\frac{2}{3}$, reduced to $\frac{16}{27}$ by "Increase." Of this $\frac{16}{27}$ the four new-born daughters will take collectively $\frac{4}{5}=\frac{64}{135}$, a slightly smaller fraction than $\frac{13}{27}=\frac{65}{135}$, the portion of four sons. But the portion which must be actually reserved is neither $\frac{64}{135}$ nor $\frac{65}{135}$, but $\frac{11}{216}$. For it is what remains when the minimum portions, assured in any event to the several living inheritors, have been deducted; now the portion of the pre-existing daughter will be smaller in company with four sons than with four more daughters. Her minimum provisional portion will therefore be, not $\frac{16}{135}$, but $\frac{13}{216}$, and the entire reserved portion will be $1-(\frac{4}{27}+\frac{4}{27}+\frac{5}{27}+\frac{13}{216})=1-\frac{101}{216}=\frac{115}{216}$.

of bastardy, they will hardly do so merely for the purpose of delaying division of the inheritance.

"*Vested Inheritances.*"

As stated in s. 157, the estate of a deceased Mussulman, so far as not disposed of by will, is considered to have vested at the moment of his death in the persons who were then his heirs; from which it follows that, however long the actual distribution may be delayed, it must be worked out, whenever it does take place on the basis of the state of the family at the moment aforesaid. If a person who was then an heir happens to have died in the interval, the portion once vested in him as such heir must be distributed among those who were *his* heirs at the moment of *his* death, or among their heirs respectively if any or all of them are dead. It is evident that the division is liable to become very complicated when (as often happens) the heirs choose to live together in a joint family for some years;* but for a simple example reference may be made to *Moohummud Ali Khan*, Macn. Dig. Inh. p. 522: "A Mussulman died leaving two sons, four daughters, and a widow: one of the sons has died since, leaving three sons."

Here the original distribution was: widow, $\frac{1}{8}$; each son, $\frac{2}{8}$ of $\frac{7}{8} = \frac{7}{32}$ each daughter, $\frac{1}{8}$ of $\frac{7}{8} = \frac{7}{64}$

Then the share of the dead son is thus distributed (assuming that the widow was not his mother): each grandson $\frac{1}{3}$ of $\frac{7}{32} = \frac{7}{96} = \frac{14}{192}$, excluding their uncle and aunts, the surviving son and daughters of the original deceased; and the other shares, being unchanged will appear in the ultimate distribution as: widow, $\frac{24}{192}$; surviving son, $\frac{42}{192}$; each daughter, $\frac{21}{192}$: total, $\frac{14+14+14+24+42+21+21+21+21}{192} = \frac{192}{192} = 1$.

Had the son predeceased his father, the grandson would have taken nothing (s. 226).

For the sake of practice in these more complex problems, where the same person claims in different capacities on successive deaths, two other examples are added.

Ex. 1.

A Muhammadan dies leaving a widow, W, and by her a son, S, and two daughters, D^1 and D^2. Afterwards one of the daughters, D^1, dies unmarried, and after her the widow. Then the son dies, leaving a widow, SW, and a son SS; and, lastly, that son dies unmarried.

I. *First Distribution*, W, $\frac{1}{8}$; S, $\frac{1}{2}$ of $\frac{7}{8} = \frac{7}{16}$; D^1, D^2, each $\frac{7}{32}$, half as much as S.

II. *Second Distribution*, of the $\frac{7}{32}$ left by D^1.

The widow now appears in the character of mother, and the son and surviving daughter as brother and sister of the last deceased. Thus we have

W, $\frac{1}{8}$ of $\frac{7}{32} = \frac{7}{192}$.
S, $\frac{2}{3}$ of $\frac{5}{6}$ of $\frac{7}{32} = \frac{5}{9}$ of $\frac{7}{32} = \frac{35}{288}$.
D^2, $\frac{1}{3}$ of &c. . $= \frac{35}{576}$.

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* M. Clavel (Droit Musulman, vol. ii, p. 84) mentions that he was personally concerned in a case of distribution in which there were 455 inheritors, and in which the least common denominator of the ultimate fractions was 45,021,486; and he reports, on the authority of Messrs. Sautayra and Cherbonneau, a case in which account had to be taken of 40 distinct successions, and in which a fraction occurred with the denominator 16, 437, 913, 583, 616

III. *Third Distribution*, of the total share of the widow, which is now $\frac{1}{8}$ from the first, and $\frac{7}{192}$ from the second distribution.

$\frac{1}{8} + \frac{7}{192} = \frac{24+7}{192} = \frac{31}{192}$; and this will be divided in the usual proportion between the two survivors of the original claimants.

S, $\frac{2}{3}$ of $\frac{31}{192} = \frac{31}{288}$; D^2, $\frac{1}{3}$ of $\frac{31}{192} = \frac{31}{576}$.

IV. *Fourth Distribution*, of the total share of S, which is now

$$\frac{7}{16} + \frac{35}{288} + \frac{31}{288} = \frac{126+35+31}{288} = \frac{192}{288} = \frac{2}{3}.$$

Of this the son's widow takes $\frac{1}{8}$ as Sharer, and the son's son the remaining $\frac{7}{8}$ as Residuary.

SW. $\frac{1}{8}$ of $\frac{2}{3} = \frac{2}{24} = \frac{1}{12}$.

SS. $\frac{7}{8}$ of $\frac{2}{3} = \frac{14}{24} = \frac{7}{12}$.

D^1 (sister) takes nothing.

V. *Fifth Distribution*, of the son's son's $\frac{7}{12}$.

SW. (mother), $\frac{1}{3}$ of $\frac{7}{12} = \frac{7}{36}$ primarily, and the whole $\frac{7}{12}$ by Return, excluding D^2, who as paternal aunt is only a D.K.

Ultimate Distribution.

D^2, $\frac{7}{32} + \frac{35}{576} + \frac{31}{576} = \frac{126+35+31}{576} = \frac{192}{576} = \frac{1}{3}$.

SW. $\frac{1}{12} + \frac{7}{12} = \frac{8}{12} = \frac{2}{3}$.

$\frac{2}{3} + \frac{1}{3} = \frac{3}{3} = 1$.

Note that, if the two ultimate inheritors had been the sole survivors at the death of the original *propositus*, the son's widow would have taken nothing, and the daughter would have taken the whole, as Sharer with Return.

Ex. 2.

A Muhammadan has three wives, W^1, W^2, W^3. By the first he has one son, W^1S; by the second a son, W^2S, and a daughter, W^2D; by the third one daughter, W^3D. The first wife dies in her husband's lifetime, leaving property. Then her husband dies, leaving no relatives other than those above mentioned; then the son of the second wife dies unmarried, and lastly the son of the first wife dies, also unmarried.

I. *First Distribution*, of the property of W^1.

Husband, $\frac{1}{4}$ (s. 211); son, W^1S, takes the residue, $\frac{3}{4}$ (s. 225).

The co-wives and stepchildren of the deceased take nothing.

II. *Second Distribution*, of the husband's $\frac{1}{4}$.

Widows, W^2 and W^3, $\frac{1}{8}$; each $\frac{1}{16}$ of $\frac{1}{4} = \frac{1}{64}$.

Sons, W^1S and W^2S, each $\frac{3}{8}$ of $\frac{7}{8}$ of $\frac{1}{4} = \frac{7}{96}$.

Daughters, W^2D and W^3D, each half as much as the sons, $\frac{7}{192}$.

III. *Third Distribution*, of the $\frac{7}{96}$ inherited by W^2S from his father.

W^2 (*now mother*), $\frac{1}{6}$ of $\frac{7}{96} = \frac{7}{576}$.

W^2D (*now full sister*) $\frac{1}{2}$ of $\frac{7}{96} = \frac{7}{192}$.

This leaves $\frac{1}{3}$ undisposed of, which will go to W^1S and W^3D (*consanguine brother and sister*) as Residuaries in the usual proportion.

W^1S, $\frac{2}{3}$ of $\frac{1}{3}$ of $\frac{7}{96} = \frac{2}{9}$ of $\frac{7}{96} = \frac{7}{432}$. W^3D, $\frac{1}{3}$ of &c., $= \frac{7}{864}$.

W^3, being only a stepmother, gets nothing.

IV. *Fourth Distribution,* on death of W^1S, whose inherited property is now $\frac{3}{4} + \frac{7}{96} + \frac{7}{432} = \frac{648+63+14}{864} = \frac{725}{864}$

Here, setting aside the two stepmothers, W^2 and W^3, we have only W^2D and W^3D, who as *consanguine sisters* divide between them, primarily, $\frac{2}{3}$, and the rest by Return (s. 238), taking therefore each $\frac{1}{2}$ of $\frac{725}{864} = \frac{725}{1728}$.

Ultimate Distribution.

W^2, $\frac{1}{64} + \frac{7}{576} = \frac{9+7}{576} = \frac{16}{576} = \frac{1}{36}$.

W^3, $\frac{1}{64}$.

W^2D, $\frac{7}{192} + \frac{7}{192} + \frac{725}{1728} = \frac{63+63+725}{1728} = \frac{851}{1728}$.

W^3D, $\frac{7}{192} + \frac{7}{864} + \frac{725}{1728} = \frac{63+14+725}{1728} = \frac{802}{1728}$.

Raising the two first fractions to the common denominator, we have

$$\frac{48+27+851+80}{1728} = \frac{1728}{1728} = 1.$$

CHAPTER IX.

WILLS AND DEATH-BED GIFTS.

The law cannot know individuals, nor accommodate itself to the diversity of their wants. All that can be required of it is, that it shall offer the best chance of supplying these wants. It remains for each proprietor, who may and who ought to know the circumstances in which those who depend upon him will be placed after his death, to correct the imperfections of the law in those cases which it could not foresee.—BENTHAM.

EXTENT OF THE TESTAMENTARY POWER, AS REGARDS PROPERTY.

270. Bequests by a Moslem can only take effect to the extent of one-third of the net assets remaining after payment of his funeral expenses and debts, unless the excess is rendered valid by the consent, given after the death of the testator, of the inheritors whose rights are infringed thereby, or by the fact of there being no such inheritors.

Limit of the testamentary power.

The one-third limit is not laid down in the Koran, but is based in the Hedaya on a tradition as to what the Prophet said to one Abu Vekass, whom he visited on what was supposed to be his death-bed, but who actually lived to report the conversation. According to that report, the Prophet's answer might very well have been taken as applying only to that particular case, which was that of a man leaving *one daughter and no other heirs;* but it appears, in fact, to have been treated by lawyers of all schools, both Sunni and Shia, as guarding the rights of all inheritors however remote, and as permitting bequests to the extent of one-third, even when there are sons as well as daughters (Hed. Book LII, chap. i). The rule was recognised by our Courts as early as 1806 (Macn. Dig Will. 5); see also *Ekin Bibee*, 1 W. R., 152 (1864); *Jumunooddeen Ahmed*, 2 W. R. Mis., 69 (1865); *Baboojan*, 10 W. R., 375 (1868); *Sukoomat Bibee*, 22 W. R., 400 (1874). This last ruling throws on the legatee the burden of proving that the bequest to him (or the whole amount of the testator's bequests if more than one) does not exceed one-third of the net assets.

In an appeal from the Recorder of Rangoon the Privy Council have held that a bequest is not taken out of this rule by the fact of its being made to an executor by way of remuneration for his trouble (*Aga Mahomed*, 25 Cal., 9 (1897)). It was stated by Lord Davey, agreeing with the learned Recorder, that it was "a gratuitous bequest" and "not in any sense a debt." The case, however, was unsatisfactory. In the Recorder's Judgment, the Arabic word *Khums* (meaning one-fifth of the property), spelt as Khooms, is treated as if it were the plural of some word *Khoom*, and is then confused with the word *Kaum* (the People), in whose favour Mr. Justice Ameer Ali is quoted as saying that a *bequest* is lawful.

In Bombay Province, Bhagdari property is subject to certain rules of succession under Bhagdari custom, which to that extent overrides Muhammadan Law; but the Muhammadan Law of wills should be applied to a Muhammadan Bhagdar, and the bequest of more than a third was held to be illegal: *Ahmad Asmal Muse*, 41 Bom., 377 (1916). Such an illegality was also hinted at in the case of the Khojas by Beaman, J. in *Cassamally Jairajbhai*, 36 Bom., 214 (1911), at p. 260. In the case of the Cutchi (Kachchhi) Memons it is settled that they have acquired by custom the whole of their property by will, but that their wills are to be interpreted according to Muhammadan and not Hindu law: *Advocate-General of Bombay* v. *Jimbabai*, 41 Bom., 181 (1915).

As to consent of heirs, see *Cherachom Vittil*, 2 Mad. H. C., 350 (1864), a case in which no costs were given, "owing to the great uncertainty of the law;" and *Nusrut Ali*, 15 W. R., 146 (1871), practically overruling *Khadejah*, 4 W. R., 36 (1865). It seems that consent given before the testator's death will be taken as confirmed by silent acquiescence after the death. Macn. 244, 245; *Sharifa Bibi*, 16 Mad., 43 (1892), where the text of the Hedaya (p. 671) is quoted and explained in this sense. The case was actually one of death-bed gift, and the objection taken to its validity was not so much excess over the bequeathable third as the fact that it was a distribution among expectant heirs in proportion differing from those prescribed by law (s. 272, *post*); but neither of these differences would affect the principle. *Daulatram*, 26 Bom., 497 (1902), is to the same effect, and also decided that consent was not invalidated under s. 276 of the Civil Procedure Code of 1882 * by the fact of its having been given after attachment of the property by creditors of the consenting heirs.

That some bequests are lawful is clearly implied in those texts of the Koran which have been referred to in the preceding chapter as the nucleus of the law of inheritance, inasmuch as each concludes with the qualifying words, "after the legacies which he shall bequeath, and his debts." But the compiler of the Hedaya, not content with the Koran and the traditions, also discusses the question, after the manner of Bentham, from the point of view of natural reason.

"Wills are lawful, on a favourable construction. Analogy would suggest that they are unlawful; because a bequest signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor (the testator); and as an endowment with reference to a future period (as if a person were to say to another, "I constitute you proprietor of this article on the morrow") is unlawful supposing even that the donor's property in the article still continues to exist at that time, it follows that the suspension of the deed to a period when the property is null and void (as at the decease of the party) is unlawful *à fortiori*. The reasons, however, for a more favourable construction in this particular are two-fold. First, there is an indispensable necessity that men should have the power of making bequests; for man, from the delusion of his hopes, is improvident and deficient in practice; but when sickness invades him he becomes alarmed, and afraid of death. At that period, therefore, he stands in need of compensating for his deficiencies by means of his property, and this in such a manner that if he should die of that illness, his objects, namely, compensation for his deficiencies and merit in a future state, may be obtained; or, on the other hand, if he should recover, that he may apply the said property to his wants; and as these objects are attainable by giving validity to wills, they are therefore ordained to be lawful. And to the objection, 'If the right of property in the proprietor become extinct at his death, how can his act of endowment become valid?' it is replied, 'His right of property is accounted to endure at that time from necessity, in the same manner as holds with respect to executing the funeral rites, or discharging the debts of the dead'" (Hed. 670).

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* Corresponding to s. 64 of the Code of 1908.

271. Where the testator has made a number of bequests which collectively exceed one-third, and are not allowed by the heir, the rule is that they must abate rateably, provided that they are all bequests to individuals.[1] But if some of the bequests are for pious purposes expressly ordained in the Koran, while others are for pious purposes not expressly ordained, the former will take precedence of the latter;[2] and the bequests for non-ordained pious purposes will be satisfied in the order in which they follow each other in the will. It is uncertain whether, as between bequests "to Almighty God" and bequests to individuals, precedence should be given to the former or to the latter, or whether both should abate rateably.[3]

Bequests in excess of the limit abate rateably. Exception.

[1] Baillie, 626; Hed. 676. Abu Hanifa's view that, if a single bequest exceeds one-third of the property, the excess must first be struck off, and that it must be reckoned as a bequest of one-third for the purpose of abating rateably with the others, must be considered to be overruled by the concurrent testimony of the "two disciples." The only priority admitted is that of a bequest for emancipating a slave—a case which cannot now occur.

[2] Baillie, 642, 643; Hed. 688. The examples given are—

(1) Of "ordained" pious purposes: pilgrimage, *zakat* (tithe or poor's rate), and gifts by way of expiation, ranking, according to the better opinion, in order of priority as here arranged;

(2) Of non-ordained pious purposes: a mosque, a receptacle for travellers, or a bridge.

[3] Ameer Ali, M.L., vol. i, p. 523, gives a long list of pious purposes, bequests for which must, in his opinion, be carried out before the payments to individuals and he quotes in the text a passage from the Radd ul Muhtar which does say, definitely enough, that "bequests to Almighty God should have precedence over all others *for the legatee is one.*" But in a footnote he gives his own translation of a passage from the Fatawa Alamgiri, (corresponding with Baillie, 642), in which we read, "when the legacies are partly to Almighty God and partly to mankind, as for instance to a class of persons, the *portion of the latter is to be taken out of the third* and to be divided among them without preference to any one over the others, and with regard to the portion of Almighty God it is to be applied first to *furaiz* (ordained pious purposes), next to *wajibat* (purposes which, though not actually prescribed in the Koran, are in themselves necessary or proper), and then to *nawafil* (obligations voluntarily assumed)." The words that I have italicised seem absolutely inconsistent with the view that bequests to Almighty God must be satisfied before individuals can get anything, and points, if anything, rather to the latter having precedence. [The sentence which follows simply shows that, as one would expect, where the amount to be devoted to each object is not specified, and where, consequently, there can be no question of insufficiency, the testator simply bequeathing a third of his property to three specified pious purposes and to an individual by name, the bequeathable third will be divided equally among the four legacies.]

The Hedaya, p. 688, has a separate section headed "Of bequests for pious purposes" (literally, of bequests for the rights of God), in which the only mention

of concurrent bequests to individuals is the following: " Lawyers have remarked, that if a person make several bequests, some for the performance of religious duties immediately enjoined by God, and others for benevolent purposes among mankind, in that case a third of his property must be set aside for the execution of them; and *whatever may be the share appropriated for the performance of the duties belonging to God*, it must be applied agreeably to the order of arrangement as already explained "—thus affording no guidance whatever as to the share which should be applied to the " rights of God " when they come into competition with the claims of individual legatees, and the testator has given no express directions. But it is significant that in the same section, when reporting the argument in favour of ranking alms (*zakat*) before pilgrimage, the compiler says: " Both are in an equally strong degree enjoined by God; but yet alms, *as being connected with the rights of mankind, must be preferred, the right of the individual preceding the right of God*," and that, in stating the argument in favour of pilgrimage, he does not in any way dispute this principle, but merely lays stress on the greater cost and bodily exertion demanded by the pilgrimage.

Bequest to heir, void.

272. A bequest to a person entitled to inherit is void unless the other inheritors give their consent, after the death of the testator, to its taking effect.

Baillie, 615. *Keramatul Nissah Bibee*, 2 Morley, 120 (1817); *Abedoonissa* v. *Ameeroonissa*, 9 W. R., 257 (1864); s.c., on appeal, under the name of *Ameeroonissa* v. *Abedoonissa*, 23 W. R., 208 (1875), 15 B. L. R., 67; L. R., 2 Ind. App., 87; *Khajooroonissa*, 2 Cal., 184, L. R., 3 Ind. App., 291 (1876); *Muhammad Ismail Khan* v. *Fidayat-un-nissa*, 3 All., 723 (1881).

The rule may seem at first sight to be in direct contradiction to the Koran, ii, 180. " It is ordained you, when any one of you is at the point of death that he bequeath a legacy to his parents and kindred in reason," or, as Palmer translates it, " the legacy is to his parents and kinsmen in reason." Sale's explanation (p. 19) is simply that this text is abrogated by the law subsequently promulgated respecting inheritances. Perhaps it is sufficient to say that, while this text insists in general terms that bequests must be so framed as to leave a reasonable provision for parents and kinsmen, chap. iv. defines exactly what that reasonable provision should be, and, as it were, makes a will for the deceased so far as they are concerned. And the Hanafi jurists inferred apparently that the testamentary freedom still left to the deceased—fixed by the extra-Koranic injunction above quoted at one-third—was to be exercised exclusively with a view to " compensation for deficiencies and merit in a future state," and not for the purpose of favouring one heir at the expense of another.

It should be clearly understood that this rule applies only to those persons if any, who are entitled to inherit in the particular case, not to the whole list of possible heirs.

As to consent given before, but confirmed by silent acquiescence after, the death of the testator, see under s. 270, *ante*.

Of course, the consent of the heirs only removes the bar occasioned by their existence, and will not validate any condition attached to the bequest which is repugnant to Muhammadan Law, such as the creation of life-estates or contingent interests; *Abdul Karim*, 28 All., 342 (1906).

To a stranger after bequest to heir for life, also void.

273. If a testator bequeaths property to one of his heirs for life, or to two or more of his heirs for their joint lives and the life of the survivor, with remainder to some stranger to whom he might lawfully bequeath it, or to

some lawful charitable purpose, then the failure of the original bequest, for want of assent of the other heirs will involve the failure of the subsequent bequest also.

Fatima Bibi v. *Ariff Ismailjee Bham*, 9 C. L. R., 66 (1881). The testator directed that the rents should go to his children, and that after the death of the last child they should be paid to the committee of the District Charitable Society for the benefit of the poor. Wilson, J., said, "I think this gift fails. The prior gift only fails because it would interfere with the distribution which the law makes among the heirs, and it would wholly defeat the testator's intentions if the heirs were ousted for the benefit of the poor."

274. When a bequest which would otherwise be void is rendered valid by the consent of the heirs, the legatee is considered to derive his title from the testator rather than from the heirs, and actual possession is not necessary to its completion. Effect of consent of heirs.

Hed. 671. "For the will of the testator is the occasion of the property, the consent of the heirs being only the removal of a bar."

275. A bequest otherwise valid is void, if the legatee can be shown to have caused the death of the testator, even unintentionally. There is a conflict among the Hanafi authorities as to whether this kind of invalidity can be cured by the consent of the heirs. Legatee causing death of testator.

Baillie, 616; Hed. 672. Abu Yusuf thought that the defect could not be so cured; Abu Hanifa and Muhammad, that it could; and the sequence in which the arguments are stated in the Hedaya probably indicates that the compiler is of the latter opinion.

276. A bequest to a person not yet in existence is void; but a child in its mother's womb is considered for this purpose as already in existence, provided it be born within six months from the date of the bequest. Bequest to unborn person.

In *Abdul Cadur* v. *Turner*, 9 Bom., 158 (1884), this principle was recognised as equally applicable, whether the case were to be governed by Muhamamdan or by Hindu Law, and Scott, J., referred to the modern Egyptian Code of Hanafi Law (Art. 531), as confirmatory of the same. The learned judge took occasion to express the opinion that "it would be a misfortune for the natives of India if testators were given the power to tie up their property for the benefit of persons unborn, to the exclusion of those who have the highest and most natural claim." But unfortunately, as will be seen below, Muhammadan Law does allow this very thing to be done in a roundabout way, under the name of Endowment, which it forbids to be done directly (see Chap. XI).

It would seem that Mr. Ameer Ali must have intended to refer to this round-about process, though his immediate subject was ordinary wills, when, at p. 534 of his Muhammadan Law, Vol. I, he penned the statement that "so long as commencement is made, in the case of a settlement or devise, with a life in being," it is not necessary that the persons who take the remainder should be in existence.

The Hindu Dispositions of Property Act, (XV of 1916), which applies to the whole of British India except the province of Madras, and may be applied by notification to that province, modifies (sec. 2), as regards Hindus, the rule about persons not yet in existence, subject to certain limitations and provisions contained in sec. 3 of the Act. Sec. 5 of the Act empowers the Governor-General in Council to extend this provision to the Khojas in specified areas. This was one of the Acts initiated by a private member of Council since such procedure became possible. This hole in the Rule against perpetuities may be compared with the Moslem Law of Wakfs as amended (or declared) by recent legislation (see. *post* Appendix, B).

Bequest of use or produce.

277. A testator may bequeath the use or produce[1] of a thing to one living person (for life or for any specified period)[2], and the thing itself to another living person; or may bequeath the use or produce simply, not disposing of the thing itself, which in that case will belong to his (the testator's) heirs, subject to the rights of the usufructuary.[3] But if a bequest, otherwise absolute in its terms, has attached to it a condition that the legatee shall not alienate the property, and that on his death it shall pass to certain other persons specified, or their heirs, the bequest takes effect without the condition, even though the persons named as successors, and living at the date of the bequest, should actually survive both the testator and the principal legatee.[4]

[1] See Baillie, Book VI, chap. vi, and Hedaya, Book LII, chap. v, both entitled "Of Usufructuary Wills," They would have been more appropriately headed "Of Usuary and of Fructuary Wills," inasmuch as both chapters carefully distinguish bequests of the "use" from bequests of the *fruit or produce* of a slave or house, and never advert to the possibility of combining the two rights so as to make up what we commonly call usufruct.

[2] The words of the Hedaya are, "either for a definite or an indefinite period," and of Baillie's Digest, "for a limited time or for ever;" but, as Mr. Baillie points out in a footnote, the expression "for ever" can only mean for the term of the legatee's life; for "as a legacy must be accepted in order to render it valid, it is obviously personal to the legatee, and can in no case be extended to his heirs." And accordingly, at p. 653, dealing with the case of the service of a slave being bequeathed to one legatee and his person to another it is said that "if the bequest be absolute, the legatee of the service is entitled to it till his death, after which it is to be transferred to the legatee of the person, if he be alive, and if not, then it is to be transferred to the heirs of the testator." And Mr. Baillie further points out that the words "for an indefinite period," or "absolute bequest," would be seen to bear the same restricted meaning in a similar case in

the Hedaya, but for the insertion in the translation of words to which there is nothing corresponding in the original.

[3] Hed. 692. "It is necessary to consign over the house or the slave to the legatee, provided they do not exceed the third of the property, in order that he may enjoy the wages or service of the slave, or the rent and use of the house, during the term prescribed, and afterwards restore it to the heirs." From this it would appear that no account is taken of the difference in value between usufruct and ownership for the purpose of determining whether a bequest of the latter exceeds the legal limit.

[4] This was assumed to be the law in *Abdul Karim* v. *Abdul Qayum*, 28 All., 342 (1906), where the bequest was to the effect stated in the text, except that there were three legatees with mutual rights of survivorship. Had there been no other objection to the condition, it would have been void under the rule laid down in s. 276 in so far as it purported to benefit the possibly unborn heirs of the living persons named; but the Court laid no stress on this, basing their decision on the broad ground that "life-estates and contingent interests are not recognised by the Muhammadan Law;" the possibility of creating a life-interest in the form of usufruct was not adverted to.

278. It is not necessary to the validity of a Muhammadan bequest that the legatee should be a Muhammadan. Bequest to infidel, good.

Hed. 672. "The bequest of a Mussulman in favour of a Zimmee is valid because God hath said in the Koran, 'Ye are not prohibited, O believers, from acts of benevolence towards those who subject themselves to you, and refrain from battles and contentions.'"

WHO MAY MAKE A WILL.

279. The only persons governed by Anglo-Muhammadan Law who are incompetent to make a will are minors and lunatics. Not minors or lunatics.

Baillie, 617, as to both. Hed. 673, as to infants.

From Hed. 525 (Book XXXV, chap. i), it may be inferred that an infant may buy and sell, etc., with the sanction of his guardian; but it does not at all follow that he can make a will with the like sanction. And certainly the Guardians and Wards Act, 1890, gives no power to guardians of either person or property to confirm wills made by their wards.

The provision of pure Muhammadan law for judicial "inhibition" of a prodigal, though of full age and not insane, from the general management of his affairs, does not appear to be generally in force in British India (see under s. 137); except in the limited sphere of action of the Courts of Wards in the various Provinces. For example, the U. P. Court of Wards Act (U. P. Act III of 1899), sec. 8 (*d*) gives power to the Local Government to declare a proprietor incapable of managing his own property either owing to a physical or mental defect, or on account of bad character or conviction of a non-bailable offence. Such a ward of Court (sec. 34C.) cannot make a will without consent of the Court of Wards, but the Court cannot withhold its consent if the testamentary disposition is not contrary to his personal law, and is not likely to embarrass the property, or to lower the family in public estimation. It may be noted that an "inhibited" person under pure Muhammadan Law may (Hed. 529)

nevertheless make a valid bequest for charitable or religious objects, though not to individuals.

Age of majority for will-making.

280. For the purpose of making a will, minority terminates on completion of the twenty-first year in the case of a minor of whose person or property a guardian (other than a guardian for a suit) has been appointed, or the superintendence of whose property has been assumed by any Court of Wards; in other cases on the completion of the eighteenth year.

This is the effect of the Indian Majority Act, 1875, s. 3, as amended by the Guardians and Wards Act, 1890, s. 52. The matters exempted from the operation of the former Act by s. 2 thereof do not include will-making. According to the Fatawa Alamgiri, Baillie, p. 617, a boy becomes competent to make a will as soon as he attains puberty. As to minority generally, see Chap. V, *ante*.

Case of lunatic testator recovering and the converse.

281. A will made by a person who was insane at the time does not become valid by the fact of his subsequent recovery.[1]

[It is uncertain whether a will made by a person who was sane at the time is rendered invalid by his subsequently becoming insane and remaining in that condition till he dies.[2]]

[1] Baillie, Dig. 617.

[2] See Ameer Ali, Mahommedan Law, vol. i, p. 463, where Kazi Khan is quoted as an authority for the affirmative. This would be contrary to the Indian Succession Act, s. 46, and to English Law.

FORMALITIES REQUIRED FOR WILL-MAKING—NONE

Will may be oral or written.

282. A Muhammadan will may be either oral or written. If oral, it must (probably) be made in presence of two male adult Moslems as witnesses. If written, its genuineness may be proved in any of the ways sanctioned by the Indian Evidence Act for the proof of facts in general, and it need not be written in any particular form or attested in any particular manner.[1]

In British India a Muhammadan, like any other person, *may* register a written will in a Registration Office, but such registration is not compulsory.[2] A testator may also deposit a

will in a sealed cover with a Registrar, to be opened on proper application after his death.[3]

[1] Oral wills are the only kind directly sanctioned by the Koran itself. The principal passage, V, 106-108, is as follows:—

"O believers! let there be witnesses between you, when death draweth nigh to any of you, at the time of making the testament; two witnesses, just men from among yourselves, or two others of a different tribe from yourselves, if ye be journeying in the earth, and the calamity of death surprise you. Ye shall shut them up both after the prayer; then if ye doubt them, they shall swear by God, 'We will not take a bribe though the party be of kin to us; neither will we conceal the testimony of God, for in that case we should surely be among the wicked.' Then if it shall be made clear that both have been guilty of a falsehood, two others of those who think them to be guilty, the two nearest in blood, shall stand up in their place, and all swear by God, 'Verily our witness is more true than the witness of these two; neither have we advanced anything untrue, for then we should assuredly be of the unjust.' Thus it will be easier for men to bear a true witness, or fear lest after their oath another oath should be given. Therefore fear God and hearken, for God feareth not the perverse." (As to the occasion of this revelation, see Sale's Koran, p. 86.)

There is no mention of written wills in the Koran, but there is a passage (II, 282) recommending the use of writing for contracts, which renders it impossible to suppose that the Prophet would have disapproved of its employment for wills. The conjecture that "the Muslim Arabs learned to make wills when they conquered the Roman provinces of Syria, Mesopotamia, and Egypt" (Anglo-Indian Codes, vol. i, p. 301), is clearly refuted by the Koran as regards oral wills, but may possibly be well-founded as regards written wills. For the origin of the former I should be inclined to look to the Roman military will (Inst. i, 11), with which the Arabs serving as allies with the Roman legionaries would naturally have become familiar long before the time of the Prophet. None of the rules and instances given in the Hedaya seem specially adapted to written wills, but this does not at all prove that they may not have been fairly common at the date of that compilation, considering the strong propensity of legal writers to blindly follow their predecessors without taking note of new facts. In British India the power of a Muhammadan to make a written will has never been doubted, but in consequence of the silence of the ancient authorities there is no fixed rule as to the mode of authenticating testamentary writings, except those rules of the Indian Evidence Act which apply to proof of documents not required by law to be attested (see ss. 47, 67, 73). The legality of an oral will was expressly recognised in the cases of *Kishwar Khan*, Morley, i, 619 (1799), and in 1851 the fact of such a will having been made was contested in two Indian Courts and before the Privy Council, without any attempt to deny its legal validity if made (*Nawab Amin-ood-Dowlah*, 5 Moo. I. A., 199). The Supreme Court of Madras appears to have considered in 1813 that "the question whether a will has been properly executed by a Muhammadan testator must be tried by the English and not by the Muhammadan Law of Evidence" (Macn. Dig. Will, 18; Morley, i, 620); but Mr. Morley remarks on this that it is not the practice of the East India Company's Courts, and the view now taken is that the question, What is proper execution? is one of substantive Succession Law, and therefore in the case of Muhammadans of Muhammadan Law, while the question whether the proper formalities (whatever they may happen to be according to the personal law of the testator) have been complied with, is one of adjective evidence-law, and therefore now of Anglo-Indian Law.

In *Aulia Bibi*, 28 All., 715 (1906), the will of a Muhammadan lady was held valid though unsigned, on proof that it had been drawn up by a vakil

in accordance with her instructions, at a time when she was competent to make a will.

[2] Indian Registration Act (XVI of 1908), sec. 18 (*e*).

[3] *Id.* Sections 42-45, where the procedure on an application for opening the will after the testator's death is prescribed.

Transfer with possession deferred may take effect as a will.

283. If a person executes a deed purporting to transfer the ownership of certain property to another person, but providing that the latter shall only obtain possession after the death of the executant, such an instrument cannot operate as a gift for want of immediate possession, but will take effect, subject to the usual restrictions, as a will.

Saiad Kasum, 7 N. W., 313 (1875).

DEATH-BED GIFTS AND ACKNOWLEDGMENTS.

Gift by a dying person can only operate as a bequest.

284. A gift made in mortal sickness is so far regarded as a bequest that it cannot operate on more than a third of the testator's net assets unless with the consent of all the heirs, nor in favour of one heir without the consent of all the others.[1]

Explanation I.—A gift is said to have been made in mortal sickness, only if it was at the time, and seemed to the donor himself, highly probable that the malady would soon end fatally, and if it did in fact so end.[2] The donor's state of mind, which is the real ground of the rule, may be, but is not necessarily to be, presumed from the gravity of the symptoms. On the other hand, no evidence of actual apprehension of death will suffice in the absence of external indicia of danger, chief among which is inability to attend to ordinary avocations.[3]

Explanation II.—It seems that the pains of child-birth are considered to be *primâ facie* a mortal sickness.[4]

[*Quœre*, as to imminent danger from other causes than sickness, such as an impending battle or a storm at sea.[5]]

Explanation III.—A so-called gift made in a mortal illness in lieu of a dower-debt is really of the nature of a sale, to which this section does not apply.[6]

[1] Baillie, 542; Hed. 684. *Wazir Jan*, 9 All., 357 (1887). This is known as the doctrine of *Marh-ul-Maut* ("fatal illness"). See also *Fazl Ahmad*,

40 All., 238 (1917). The original Shia authorities are divided on the subject, some of them holding that a gift during *Marh-ul-maut* would operate in respect of the whole of the donor's estate. These authorities were carefully reviewed by Tudball and Rafiz, JJ. in *Khurshed Hussain*, 36 All., 289 (1914), and it was authority laid down that the Shia law in this respect is the same as Sunni law, and that such a gift only holds good to the extent of one-third of the donor's estate inspite of delivery of possession prior to his death.

[2] Baillie, 543. "The lame, the paralytic, the consumptive, and a person having a withered or a palsied hand, when the malady is of long continuance and there is no immediate apprehension of death, may make gifts of the whole of their property." The Hedaya fixes the period of long continuance at one year, but this is not taken as a hard and fast limit; *Labbi Bibi*, 6 N. W., 159 (1874); *Muhammad Gulshere Khan*, 3 All., 731 (1881). For the Shia law, see sec. 479 below.

[3] *Fatima Bibi*, 31 Cal., 319 (1903); affirmed by the P. C. on appeal, 37 Cal., 271 (1907); *Sarabai*, 30 Bom., 537 (1905); *Rashid* v. *Sherbanoo*, 31 Bom., 264 (1907). Mr. Abdur Rahim, Muh. Jur. p. 256, questions the correctness of these rulings, in so far as they lay stress on the subjective apprehension of death as the test.

[4] Baillie, 544, next sentence to that last cited.

[5] Ameer Ali, M. L. vol. i, p. 466, in quoting the express statement of the Shia authorities that "occasions of actual conflict in war, or of a childbirth with women, or of storms at sea, have not the effect of impairing a person's power to dispose of his property, because in point of fact the term disease is quite inapplicable to them," remarks in a footnote, "on this point the Hanafis differ;" but the remark seems to be unsupported by anything in Baillie's Digest or in the Hedaya, except as regards childbirth, and he refers to no other authority.

[6] *Esahaq Chowdhry*, 42 Cal., 361 (1914).

285. If a dying person seeks to confer an advantage on another person under colour of a sale or purchase on terms unfavourable to himself, the transaction is regarded as a bequest to the extent of the advantage so conferred, and is subject as such to the restrictions above mentioned; provided always that, in case of competition between a disguised gift of this kind and an undisguised death-bed gift or an ordinary legacy, they do not abate rateably, but preference must be given to the former.

Even though it be under colour of sale.

Illustrations.

(*a*) A, on his death-bed, sells to B, for 6,000 rupees, a house really worth 12,000 rupees. After A's death his net assets, as they stood before the commencement of his last illness, turn out to be worth 15,000 rupees, so that the bequeathable maximum was only 5,000 rupees. The purchase is regarded in law as a death-bed gift to B of 6,000 rupees, the difference between the real value of the house and the price received, and is consequently invalid (as against the heirs, if any, who do not consent to it) in respect of the 1,000 rupees by which it exceeds the disposable third. B must either add this sum to the amount already paid by him, or else annul the transaction altogether, restoring the house, and taking back his purchase-money.

(*b*) The facts are the same, except that A also gave on his death-bed 1,000 rupees to C. This gift is void as against the heirs, because the whole of the bequeathable third

is considered to have been exhausted by the disguised death-bed gift of 5,000 rupees to B, and the latter is entitled to precedence.

Hed. 685-6. The technical term for a gift disguised as a contract is Mohabat. It is odd that a double fiction should be treated with more indulgence than a single one; but perhaps the notion is that it is not worthwhile to go into the generally difficult question as to inadequacy of consideration, when the only competing claim is based on nothing stronger than a death-bed gift.

The Muhammadan lawyers discuss in this connection several curious points arising out of the death-bed manumission of a slave, which have no longer any practical interest in British India. See Hed. 685-687.

A good illustration of a death-bed gift under colour of sale is furnished in *Fazl Ahmad* v. *Rahim Bibi*, 40 All., 238 (1917), in which the dying man purported to sell property for two lakhs of rupees, of which the deed stated that he had received only Rs. 10,000 in cash and left the remaining Rs. 1,90,000 with the vendee to spend it at the vendee's discretion "for good purposes," for the benefit of the vendor's soul in the next world. It was held to be a gift to one of the heirs, and therefore invalid.

Death-bed acknowledgment of debt.

286. If a person in mortal sickness acknowledges a debt of which there is no other proof, the acknowledgment is conclusive as against heirs and legatees, and it is not open to them to plead that it is only a death-bed gift in disguise. But it is so far regarded with suspicion that the claim based on it will be postponed to claims acknowledged while the deceased was in health, or proved by other evidence. And if the acknowledgment is made in favour of an heir, the suspicion of its being employed to evade the rule against bequeathing to heirs is so much stronger, that no effect at all will be given to it.

Hed. 436-438 and 684. The third branch of the rule is thus illustrated; "If a sick person makes an acknowledgment of debt due by him to his son, or make a bequest in his favour, or bestow a gift upon him, at a time when the son was a Christian and he [the son] afterwards, previous to his father's death, becomes a Mussulman, all those deeds of acknowledgment, gift, or bequest are void; the bequest and the gift because of the son being an heir at the death of his father, as above explained; and the acknowledgment because, although the son on account of the bar (namely, difference of religion), was not an heir at the time of making it, still the cause of inheritance (namely, consanguinity) did then exist, which throws an imputation on the father, as it engenders a suspicion that he may have made a false declaration, in order to secure the descent of part of his fortune to his son." See also Baillie, 684.

It is perhaps open to argument, whether this rule about the effect of death-bed acknowledgments is not a mere rule of evidence and as such outside the sphere of Anglo-Muhammadan Law. But the fact of its being repeated in Book LII, which treats of Wills, after having been stated in Book XXV, of which the subject is "Acknowledgments," tends rather to show that in the opinion of Muhammadan lawyers it was an integral part of their substantive law of succession; and it seems more convenient on the whole that it should be

so treated, because the sentiment underlying it is so closely connected with the Muhammadan religion. It is better, in the opinion of devout Moslems, to be over-credulous in accepting the word of a dying man, than to run any risk of sending him before his Maker with his just debts undischarged. This is a scruple of which no general code of judicial evidence can well take account, but which seems an eminently fit subject for that policy of compromise and tolerated diversity which is the essence of Anglo-Muhammadan Law.

INTERPRETATION OF WILLS.

287. The description, contained in a will, of property the subject of gift shall, except as hereinafter stated,[1] and unless a contrary intention appear by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.[2]

A will speaks (generally) as from date of death.

Illustrations.

(*a*) "If a person who is poor bequeath to another the third of his property and afterwards become rich, the legatee is in that case entitled to a third of his estate, to whatever amount ; the law is also the same in case the testator, being rich at the time of making the will, should afterwards become poor, and again acquire wealth."[3]

(*b*) If a person bequeath "a fourth of his goats" to Zeyd, and it happen either that he has no goats, or that such as he had were destroyed before his death, the bequest is null. If, on the contrary, having no goats at the time, he should afterwards acquire goats, so as to leave some at his death, one-fourth of them goes as a legacy to Zeyd.[4]

[1] See s. 289.

[2] The wording of this rule is taken with slight modification from the Indian Succession Act, s. 77, which again follows the English law ; because, although that Act has no application to Muhammadans, the cases stated in the Hedaya, and represented here by illustrations (*a*) and (*b*), show that this particular principle is as fully recognised in their law as in ours.

[3] Hed. Book LII, chap. ii, p. 679, quoted *verbatim*. The reason assigned is that "the bequest does not take effect until after the death of the testator, and therefore the condition of validity is his being possessed of property at the time of his decease."

[4] Hed. 679. The bequest there is of "a *third* of my goats," but I have made it a fourth in order to make it quite clear to the reader that the legal restriction to one-third of the whole property has nothing to do with this case.

288. If a testator bequeaths one or more articles of a specified kind, without identifying any particular articles as the object of the bequest, and it turns out that he had no such article in his possession at the time of his death, the Court must be guided by the context and the circumstances of the case in determining whether or not it was his intention that such an article, or articles, should be purchased out of his general assets and given to the legatee.[1]

Bequest of a thing generically described, no such thing being in testator's possession at his death.

Illustrations.[2]

(*a*) A person bequeaths "a goat of my property." Unless a contrary intention appears from the context, this will be understood to mean "a goat to be provided out of my property, whether or not I happen to possess any goats at the time of my death."

(*b*) A person bequeaths "one of my goats." In this case the form of expression shows that the bequest was intended to be conditional on his having some goats at the time of his death.

(*c*) A person bequeaths simply "a goat." The Hanafi lawyers differ as to what intention should be presumed in this case[3] [and the Court would probably allow surrounding circumstances to turn the scale either way[4]].

[1] Here again no such rule is actually formulated in the Hedaya, but it may be gathered from the concrete cases which are there discussed and from which the above illustrations are taken.

[2] Hed. 679, 680.

[3] From the order in which the opposing views with respect to the bequest of "a goat" are stated in the Hedaya, it would seem that the compiler himself inclines to hold the bequest valid even if the testator left no goats; and this certainly seems the more natural construction, in the absence of special circumstances.

[4] I know of no Muhammadan authority for or against the words enclosed in brackets. As an example of a circumstance which would affect the case, suppose the testator to have had no goats at the time of the bequest. Then it would be extremely unlikely that in bequeathing "a goat" he should have contemplated afterwards acquiring one or more of those animals, and much more likely that he intended a goat to be purchased out of his assets for the legatee. On the other hand, if goats were not easily procurable in that district but he happened to possess some at the date of his will, this would lend considerable force to the contention that he would not have made such a bequest if he had foreseen that he was going to lose them all.

Bequest of a fraction of testator's stock of certain articles.

289. If a person bequeaths a specified fraction of all the articles belonging to him of a specified kind, such articles being homogeneous, the legatee will be entitled to the number which constituted that fraction at the time of the bequest, even though the total number of such articles in the possession of the testator should be reduced before his death, provided that the specified number still remains, and does not exceed in value the legal third of the entire net assets.

Illustration.

A testator bequeaths "a fourth of my goats," having forty goats at the time. He dies leaving only twenty goats. The legatee is entitled to ten goats, provided that the entire value of the testator's net assets is at least three times that of the ten goats.

Baillie, 631; Hed. 678. I have altered the fraction from a third to a fourth, for the same reason as before. This exception to the general rule of interpretation stated in s. 287 seems not to have been universally admitted, and the argument by which it is defended by "our doctors" is not very lucidly stated. But I think it amounts to this, that the bequest of a fraction of a number presumably known to the testator at the time is practically equivalent to specifying the

number which would then constitute that fraction, *provided that the articles in question are all of the same kind and the same value.*

Where the articles are of different kinds, or of such a kind that there is no presumption of equal value, the reason for the exception fails, and the general rule of interpretation takes effect, as is shown in the next section.

The burden of proving that the testator possessed more of the articles in question at the date of the bequest than are found among his assets at his death will of course be on the legatee. See the Indian Evidence Act, s. 103.

290. If the bequest be of a specified fraction of articles which are not homogeneous, and the total number of such articles belonging to the testator be reduced between the time of his bequest and the time of his death, the legatee will only be entitled to the specified fraction of the articles belonging to the testator at the time of his death.

Different rule where the articles are not homogeneous.

Illustration.

A testator bequeaths "a fourth of my clothes." If the clothes are of different kinds, and some of them are destroyed or disposed of after the date of the bequest, the legatee will only have a fourth of those that remain in the possession of the testator at the time of his death.

Baillie, 631 ; Hed. 679.

290A. The legatee of the "use" of a house is only entitled to reside in it, not to let it ; and conversely the legatee of the "produce" of a house is only entitled to let it, not to reside in it.

"Use" or "produce" of a house.

Hed. 693 ; Baillie, 654. In both books this is noted not as the undisputed, but as the prevailing Hanafi doctrine. The opposite view found favour, as we shall see, with the school of Shafei.

REVOCATION OF BEQUESTS.

291. A bequest may be revoked by express declaration, oral or written, or by any act showing an intention to revoke it, as by destroying the subject-matter or transferring it to another person.

How a bequest may be revoked.

[For the purpose of this section a thing is said to be destroyed when its character is so completely changed that it would ordinarily be described by a different word.]

Illustrations.

(*a*) A testator bequeaths a bar of iron, and afterwards has it made into a sword. The bequest is revoked.

(*b*) A piece of ground is bequeathed, and the testator afterwards erects a building on it. The bequest is revoked.

(*c*) A testator bequeaths a house, and afterwards plasters the walls. The bequest is not revoked.

Baillie, 618; Hed. 674. The words in brackets are not taken directly from the books, but seem to express the principle deducible from the numerous cases there stated, from which the three illustrations here subjoined are selected.

Revocation not presumed from subsequent bequest of the same thing.

292. An intention to revoke a bequest is not to be presumed from the mere fact of the subject-matter being bequeathed to another person by a later clause of the same will, or by a separate codicil.[1] In default of any other indication of the testator's intention, the two bequests will be construed as one, and the first and second legatees will be jointly entitled to the thing in question.[2]

[1] I use the term "codicil" to denote any testamentary disposition, whether purporting to be a will or a codicil, which is made after a previous will and does not profess to revoke it. And I use both "will" and "codicil" to include oral declarations before witnesses, such being in fact the kind of will almost exclusively referred to in the Muhammadan law-sources.

[2] Baillie, 620; Hed. 675.

Denial by testator.

293. There is a conflict of authority as to whether the fact of a testator denying that he ever made the bequest in question operates as a revocation, so as to exclude evidence that the bequest was in fact made.

Baillie, 619; Hed. 675. There is also a conflict between these two books as to which view was taken by Abu Yusuf and which by Muhammad; but both books indicate a preference for the view that a denial is not a revocation, and this view is confirmed by the Modern Egyptian Code, Art. 545.

LAPSE AND ACCRUAL.

Legatee dying before testator.

294. If the legatee does not survive the testator the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appear by the will that the testator intended that it should go to some other person. In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

I have stated this rule in terms of the Indian Succession Act, s. 92, although that Act has no application to Muhammadans, because the coincidence of the Muhammadan (Hanafi) Law on this particular point seems to be clearly established by the treatment of such special cases as that noticed in the next section.

The Shia law is otherwise, as will be shown hereafter.

295. If there be an unconditional bequest to two persons simply (as for instance "to A and B"), and one of the persons named was dead at the time of the bequest, or had never come into existence, or if he was not named, but described generically, and there was no one at that time exactly answering the description, the other legatee, supposing him to survive the testator, will take the entire legacy.

When a bequest accrues to the co-legatee instead of lapsing.

296. If the bequest was "to be divided between" two persons named, then, even if one of those persons was non-existent at the time of the bequest, his share will lapse to the heirs of the testator instead of accruing to the surviving legatee.

Not when "to be divided."

297. Even where the bequest is in the conjunctive form as in s. 295, if the second person named, or sufficiently indicated, as co-legatee was in existence and qualified to take at the date of the will, but is dead, or has ceased to satisfy the conditions attached to the bequest, at the time of the testator's death, in this case also the share so failing will not accrue to the first-named legatee, but will lapse for the benefit of the testator's heirs.

Nor if the deceased co-legatee was alive and qualified at the date of the will.

The last three sections are based on the following passage of Baillie's Digest, p. 631, which appears to be itself based on the Fatawa Alamgiri, the Kafi, and the Durr ul Mukhtar. The present writer is responsible for the italics and for the matter in brackets.

If a man should bequeath a third of his property—

This is s. 295.

- "to Zeid and Bukr," *Bukr being dead at the time* whether with or (*a*) without the knowledge of the testator, or "to Zeid, and Bukr if he be alive," he being in fact dead,
- or (*b*) "to him (Zeid ?) and to the person in this house"—no one being in the house,*
- or (*c*) "to him and to his posterity" (and the legatee named leaves no posterity),
- or (*d*) "to him and to a child of Bukr" (quoted as "*the* child," p. 633 note), and his (Bukr's) child *dies before the testator*,
- or (*e*) "to him and to the poor of his children,"
- or (*f*) "[to him [Zeid] and]† to him who may become poor of his children—(or of the children of another person named, as appears from p. 633)—and the condition fails *at the time of his death*,

* Note that in this as in many other instances the bequest is evidently assumed to be oral.

† The words in brackets are not in Baillie's translation, but seem to be necessary in order to make sense of the passage.

the whole legacy is to Zeid, in all of these cases; for the non-existing or the dead can have no right, and, there being no one to contend with Zeid, the legacy is the same as if it were to him alone.

[The Hedaya, Book LII, chap. ii, p. 679, quaintly illustrates this by saying that it is the same as if the legacy were "to Zeid and to a wall." In that case the testator would of course know that the second part of his bequest was a mere unmeaning flourish; and the Hedaya goes on to say that, according to one report of Abu Yusuf's opinion, that lawyer was disposed to limit the accrual to cases in which the non-existence of the legatee was known to the testator at the time of the bequest.]

With regard to Zeid and his posterity, as they are to follow him after his death, they are to be considered as non-existing at present. [In other words, though Zeid may have had issue living at the time of the bequest, the term "posterity" would be a misnomer until they had survived him.]

This is s. 297.

In [the above-mentioned] cases, *the competitor with Zeid is out of the contest from the beginning;* [that is, either from the time of making the will, as in examples (*a*), (*b*), and (*c*) above, or from a point of time anterior to the death of the testator, as in examples (*d*), (*e*), and (*f*) above]; but if he were at first competent to contend with him, and should subsequently become disqualified by failure of a condition, Zeid would have only a half.

Thus, (*g*) if a person should say "a third of my property to Zeid and Bukr, if I die, he (Bukr) being alive *and* * poor" [as he is at the time of the bequest], and the testator dies when Bukr is dead or rich;

Or (*h*) if he should say, "to him or to Bukr *if* he be in the house" [at the time of my death], and he is not in it;

Or (*i*) "to him and the children of such an one *if* they become poor" and they do not *become* (continue ?) poor till [*i.e.* before], the testator dies;

Or (*j*) to "him *and* to his heir;"†

In all these cases the legatee has only half of the third.

The principle in these cases is that when the person conjoined with another *enters into a bequest* (explained by Baillie to mean "when the legacy vests in him"—more accurately, "when he is then qualified to take the legacy"), and then comes out of it by the failure of a condition, he does not occasion any accession to the right of the other, and ‡ that, when he does not enter into the bequest for want of personality or competence, the other takes the whole. [It must be confessed that the difference between (*c*) and (*j*) and between (*d*), (*e*), (*f*) and (*g*) (*h*) (*i*) is substantially small, and turns upon the construction of the Arabic words used, as is also the case with (*k*) for this reason the generalisations in secs. 295, 296, and 297 are only of provissional or illustrative value. In construing a will made in English or in Persian or one of the Indian languages the main point to which Anglo-Muhammadan law will look will be the testator's intention.]

This is s. 296.

And (*k*) if one should say, "a third of my property *between* Zeid and Bukr," Bukr being dead at the time, Zeid would have only a half of the third, because the word "between" implies a division in half, in so much that if he were to say "between Zeid"—and then stop, Zeid would have (only) a half also."

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* *Or* in Baillie's translation, which must be a mistake.

† In this case we are apparently meant to understand that at the date of the bequest the first-named legatee had one, and only one, heir presumptive, who was thus "competent to contend with him," though he was either dead or had ceased to answer that description at the time of the testator's death.

‡ *Sic.* It should be "but."

(If Bukr was alive at the time of the bequest the present section would apply, and it would be immaterial whether the form was conjunctive or disjunctive,—" between " or " and.")

298. If there be a bequest to two persons jointly, one of whom turns out on the death of the testator to be one of the testator's heirs, and, as such, disqualified to be his legatee (s. 272), the share of that person does not accrue to his co-legatee, but goes to augment the portions of the heirs, including his own portion in that capacity.

Bequest to two persons, one of whom is an heir, or the slayer of the testator.

The rule is the same if one of the co-legatees is proved to be disqualified under s. 275 as having caused the death of the testator, except that he can then take nothing as heir, the same disqualification barring any right of inheritance that might otherwise belong to him (s. 267).

Baillie, 636, 637; Hed. 681.

PART IV.—ALIENATION.

CHAPTER X.

GIFTS.

They will ask thee what they shall bestow in alms; answer, the good which ye bestow, let it be given to parents, and kindred, and orphans, and the poor, and the homeless.—*Koran*, ii. 215.

Ye are one brotherhood. Nothing which belongs to another is lawful unto his brother, unless freely given out of good will.—*From the Farewell Address attributed to the Prophet, in Ameer Ali's "Spirit of Islam,"* p. 215.

Deeds of Gift are lawful; because the prophet has said: "Send ye presents to each other for the increase of your love."—*Hedaya.*

Extent of application, local and terminological.

299. The Muhammadan Law of Gifts is expressly recognised by the enactments in force in the Panjab, in Oudh, and in the Central Provinces, and is administered as a matter of equity and good conscience in other parts of British India.[1]

Quœre.—Is the applicability of Muhammadan Law limited to transactions coming properly within the acceptation of the English word "gift," or does it extend to all matters which are treated in Muhammadan law-books as parts of the same subject?[2]

Submitted.—The proper meaning of the English word "gift," rather than Muhammadan definitions of approximate Arabic equivalents, is the test whether a given transaction is governed by the Muhammadan Law as being a gift, or by the general law of India as being a sale or exchange, or some other kind of contract. But when it is settled that according to this test the transaction must be valid as a gift if at all, its validity and effect must be ascertained exclusively from the Muhammadan law-sources.

[1] See Chap. I, s. 4 and note, and s. 5.

[2] The importance of this distinction will appear from the next section. According to the Transfer of Property Act, 1882, s. 123, "Gift is the transfer of certain existing immovable property made voluntarily and without consideration, by one person called the donor to another called the donee, and accepted by or on behalf of the donee." This is not authoritative, seeing that, by

s. 129, " nothing in this chapter shall be deemed to affect any rule of Muhammadan Law ; " but it expresses pretty accurately the accepted meaning of the term.

A " gift " includes a transaction in which the donor's bounty passes to his intended beneficiary through the medium of a trust ; *e.g.*, in the form " A to B in trust for C " ; Muhammadan law applies to such a gift by trust, which, if without consideration, is void without delivery of such possession as the object of the gift is susceptible of : *Sadik Husain Khan*, L. R. 43 I. A., 212 (1916).

300. The Muhammadan Law distinguishes two kinds of gifts (properly so called) by the terms *sadakah* and *hiba*. Both are voluntary transfers of property without consideration ; but whereas the use of the term *sadakah* indicates that the special motive for the gift is to acquire religious merit, or " nearness to God,"[1] the presumed motive of *hiba* is either to manifest affection towards, or to win the affection of, an individual donee.[2] Sadakah and hiba.

When the term *hiba* is qualified by adjuncts importing consideration, the transactions so designated are regarded in Muhammadan Law partly as gifts and partly as sales or exchanges. It is with respect to these that the doubt mentioned in the preceding section arises.[3]

[1] See Baillie, Book VIII, chap. ix. He translates it " charity ; " but it must not be inferred, either from this or from what has been said above as to the motive, that it is necessarily a gift of the kind that we should class as charitable or religious. A gift to rich relatives may be *sadakah*, just as much as a gift to poor strangers, if the motive is to please God rather than man.

[2] Hed. 482. " *Hiba*, in its literal sense, signifies the donation of a thing from which the donee may derive a benefit ; in the language of the law it means a transfer of property, made immediately and without any exchange."

Baillie, 507. " Gift (*hibut*), as it is defined in the law, is the conferring of a right of property * in something specific, without an exchange."

Macn. 50. " A gift is defined to be the conferring of property without a consideration."

By exchange, or consideration (*iwaz*), is meant what English lawyers call " valuable consideration." Hence an agreement to pay an annuity to plaintiff and his descendants " in consideration of your being my cousin " was held to be a gift if anything, and to be void as a gift because relating to a future time : *Jafar Ali*, 5 Bom. H. C., A. C. J., 37 (1868). But if two persons, A and B, mutually agree to make over their respective rights to one and the same recipient, C, though in a perfectly gratuitous manner so far as C is concerned, the transfer by each may be regarded, as between A and B, as valuable consideration for the transfer by the other, so as to take the case out of the purview of the rules governing *hiba* simply : *Ashidbai* v. *Abdulla*, 31 Bom., 271 (1906), following *Mahammadunissa Begum*, 29 Bom., 428 (1905), and the English case of *Norman* v.

* *Tamlik*, from *milk*, ownership. We shall see presently that *hiba* is not in practice quite so strictly limited as this definition seems to imply.

Thompson, 4 Ex. Ch., 755 (1850). On the other hand, *hiba* must be distinguished from *ariat*, loan for use (*commodatum*), which is also a transfer without consideration, but not a transfer of ownership; *Muhammad Faiz Ahmad*, 3 All., 490, and L. R., 8 Ind. Ap., 25 (1881).

[3] The question whether *hiba bil iwaz* (gift with exchange), and *hiba ba shart ul iwaz* (gift with stipulation for exchange), come properly within the purview of Anglo-Muhammadan Law, is complicated by the fact that the former expression is stated by Baillie to have acquired a different signification in Indian usage from that which it bears in the older Muhammadan law-books. He tells us (pp. 122 and 532) that what is known by that name in India, being in the form, "I give this in exchange for that," is properly a sale (*i.e.* either sale or barter); whereas the true *Hiba bil Iwaz* is of two kinds, according as the exchange is or is not stipulated for at the time of the gift, but in both kinds there are two distinct acts,—first, the original gift, and second, the *Iwaz*, or exchange. Comparing this with the treatment of the subject by Macnaghten, and by Ameer Ali, M.L. vol. i, chap. iv, we must conclude that what these writers mean by *hiba bil iwaz* simply is Baillie's "Indian form," which "resembles sale in all its legal incidents," and that what they call *hiba ba shart ul iwaz* is his "second kind" of the "true" *Hiba bil iwaz*, which is said to be "gift in its first stage," so that it requires seisin to complete it, and so forth, but "sale" after mutual possession has been taken. What, then, of Baillie's "first kind of true *Hiba bil iwaz*"? Here the original gift is unconditional, and as such requires to be completed by seisin, and is, or may be, revocable. The *iwaz* is an after-thought on the part of the donee, who spontaneously tenders something to the donor in return. This, like the original gift, requires to be completed by possession, and the result then is that both gifts become irrevocable; but the incidents which the Muhammadan Law attaches to a sale (*e.g.* option of defect and pre-emption) do not follow.

Apart from decided cases one would be inclined to say that only the first and last of the four transactions above mentioned: that is to say, only *hiba* simply, or *hiba* followed by an independent and uncovenanted *iwaz*, or return-present, would be regulated in British India by the Muhammadan Law of Gifts, and that the others would be governed by the general contract-law of India, including those chapters of the Transfer of Property Act which treat of sales and exchanges, and which, like the Indian Contract Act, contain no saving clause exempting Muhammadans. The Muhammadan Law of Sale having confessedly ceased to be administered *eo nomine* since 1872 (except in the matter of pre-emption), one would hardly expect it to be revived merely by attaching the name of gift to a transaction which is "said to resemble sale in all its incidents."

The rulings, or *dicta*, bearing on the point are the following:—*Khajooroonissa*, 2 Cal., 184, and L. R., 2 Ind. App., 291 (1876): *held* by the P. C. that a deed purporting to "give," in consideration of a sum of money, the "donors" share in a zemindary, could not stand as a gift for want of seisin, but it was said that it might have been upheld as *hiba bil iwaz* had the consideration been real, which in their Lordships' opinion it was not. Had it been real, the "gift" would have been, according to the Muhammadan authorities, "a sale in all its legal incidents," and some point might conceivably have arisen turning on a difference between the Muhammadan and the Anglo-Indian laws of sale. This ruling was approved and followed by their Lordships in *Chaudhri Mehdi Hasan*, 28 All., 439, and L. R., 33 Ind. App., 68 (1906).

Muhammad Faiz Ahmad, already referred to as showing the difference between *hiba* and *ariat*, gift of ownership and temporary licence to occupy and take the profits, which was the only point in dispute; the donee's possession not being disputed, it did not matter whether the "gift" was gratuitous or not; but the P.C. considered that there was valuable consideration in the shape of waiver of certain rights, and pronounced it to be a case of *hiba bil iwaz*.

Rahim Baksh, 11 All., 1 (1888). Gift in consideration of *past* services, held by Mahmood, J., *not* to be *hiba bil iwaz*, but *hiba* simply, and as such void for want of delivery of possession.

Muhammad Esuph, 23 Mad., 70 (1899): "gift" of land to wife in lieu of dower; held to be *hiba bil iwaz*, and as such valid without delivery of possession. This is identical with Case XVI in Macnaghten's "Precedents of Gifts," which was pronounced to be *hiba bil iwaz*, "a gift of the description which 'resembles a sale in both stages.'"

It will be seen that none of these cases really raises the point, whether or not, when the Court pronounces a transfer of property to be *hiba bil iwaz*, it thereby removes it altogether from the sphere of Muhammadan Law to that of the general law of India.

301. The donee of a thing susceptible of physical possession acquires no right over it [nor apparently any personal claim against the donor] unless he actually takes possession of it with the permission, express or implied, of the donor. Necessity for seisin.

Baillie, 508, citing from the Inayah a saying of the Prophet—"a gift is not valid unless possessed." Hed. 482: "Gifts are rendered valid by tender, acceptance, and seisin." The mere declaration of gift does not by itself amount to permission to take possession; but silence is taken for consent if possession is taken without objection "in the meeting of the deed of gift." Possession taken subsequently must be proved to be with consent of the donor. Baillie, 513.

The Muhammadan rules as to what constitutes delivery of possession of tangible property do not, as interpreted by modern decisions, differ materially from those laid down in the Indian Contract Act, ss. 90-94, for delivery of goods sold, and in English text-books with regard to transfer of possession of lands or houses which were in the direct occupation of the transferor. Some difficulty was formerly occasioned by the rigour with which some of the Islamic jurists appeared to insist on the absolute vacating of a dwelling-house by the donor, and exclusive occupation thenceforth by the donee. In Case XXII of Macnaghten's Precedents of Gifts, p. 231, the law-officers advised, as any English lawyer would have advised, that the gift of a dwelling-house had not been completed by possession, the fact being admitted, *and not explained*, that the donor continued in joint occupation with the donee; but they went on to say: "In books of law it is expressly stated that, if a person dispose by gift of a house to another and continue himself to inhabit it, *or even keep some part of his property therein* the gift is void. Except in the instance of a wife, who may give a house to a husband, in which case the gift will be good, although she continue to occupy it along with her husband, and keep all her property therein; because the wife, and her property, are both in the legal possession of her husband. So also some lawyers have held that, if a father transfer his house to his minor son himself continuing to occupy it and to keep his property therein, the gift is valid; on this principle, that the father, in retaining possession, is acting as agent for his son, according to which doctrine his possession is equivalent to that of his son. But some lawyers object even to this principle. It is clear, however, that with the exception of the two instances above quoted namely that of the gift from the wife to the husband, and from the father to the minor son, any person disposing of his house to another by gift must relinquish possession to legalise the donation, *and must so completely vacate it as not to leave even a straw of his own property remaining therein*, and must divest himself of all use and benefit therefrom, surrendering it wholly to the donee." They supported

their opinion by numerous citations affirmative of the general principle. The real question, however, was, whether the two admitted exceptions were meant to be exhaustive, or merely illustrative of another general principle, limiting the first. The reason given for excepting the wife's gift to her husband would manifestly cover the converse case, because by Muhammadan Law the wife is no more in the legal possession of the husband than the husband in that of the wife; the obligation to reside together is mutual, nor is her property in any sense his; and it was accordingly held in *Amina Bibi*, 1 Bom. H. C., 157 (1864), that, where the gift was by the husband to the wife, his continuing to reside therein with her, after handing over the keys and going away for a short time, did not invalidate it. A similar decision was given in *Azimunessa* v. *Dale*, 6 Mad. H. C., 455 (1871). In 1884, in a case where the donee was actually a stranger in blood to the donor, though treated to some extent as a son, and the donor had not even temporarily vacated the house which was the subject of gift, it was for the first time laid down broadly that " an appropriate intention, where two are present on the same premises, may put the one out and the other into possession without any actual physical departure or formal entry, and effect is to be given as far as possible to the purpose of an owner, whose intention to transfer has been unequivocally manifested "—in this case by a registered deed of gift · *Shaik Ibhram*, 9 Bom., 146 (1884), at p. 150. This ruling was followed in *Khaver Sultan*, 29 Bom., 468 (1905); *Humera Bibi*, 28 All., 147 (1905); and lastly in *Kandath Veethil Bava*, 30 Mad., 305 (1907), distinguishing or overruling *Bava Sahib*, 19 Mad., 343 (1896).

As to the words in brackets, they seem to be sufficiently supported by the silence of the books as to any distinction under this head between rights *in rem* and rights *in personam*, and by the analogy of the English and other systems which do not in general allow any action on a gratuitous promise.

Registration neither necessary nor sufficient.

302. In gifts purporting to transfer the immediate right to direct possession of a tangible object, movable or immovable, registration is neither a valid substitute for, nor (in the case of movables) a necessary adjunct to, actual delivery of possession.

Mogulsha, 11 Bom., 517 (1887): As already stated, nothing in the Chapter of Gifts in the Transfer of Property Act, 1882, is to affect any rule of Muhammadan Law so that s. 123 of that Act is inapplicable. But there is no similar saving clause in the Registration Act, 1908, s.17 of which specifies " instruments of gift of immovable property " among those for which registration is compulsory. Hence, if a gift of immovable property purports to be made by a written instrument, it seems that it must now be registered; but gifts of movable property are among the " other documents " of which, under s. 8 (*f*) of the Act, registration is optional. A gift to which Muhammadan Law applies, made by a registered trust-deed and valid as far as the Transper of Proferty Act (IV of 1882) is would be void for want of delivery of possession where the Muhammadan Law requires such delivery [*Sadik Husain Khan*, L. R., 43 I. A., 212 (1916)]. On the other hand, a gift of immovable property, valid according to the Muhammadan Law, is none the less valid because there was a deed of gift, which owing to a defect in the attestation, was invalid under sec. 123 of the Transfer of Property Act, IV of 1882: *Karam Ilahi*, 38 All., 212 (1916). Though not a valid substitute a registered deed of gift may, as has been shown under the preceding section, be very important as the clearest possible evidence of intention, where the acts alleged to constitute dilivery of possession are in themselves ambiguous; *Ismal* v *Ramji*, 23 Bom., 682, 684 (1899).

303. No transfer is necessary in the case of a gift by a father to his infant son, the declaration of gift being considered to change the possession by the father on his own account into possession as guardian on his son's account. And the law is the same in every other case where the donee is a minor in lawful custody of the donor.

No change of possession necessary in gift by father to infant son.

Baillie, 529 ; Hed. 484. *Wajeed Ali* v. *Abdul Ali*, W. R., 1864, 127 ; *Hussain* v. *Shaikh Mira*, 13 Mad., 46 (1889) ; *Ameeroonissa Khatoon* v. *Abedoonissa*, 15 B. L. R., 67, and L. R., 2 Ind. App., 87 (1875), followed in *Fatima Bibee* v. *Ahmad Baksh*, 31 Cal., 319 (1903). See also *Fakir Mynar Muhammed Rowther*, 35 Mad., 120 (1912).

304. A gift to an orphan minor may be completed by placing the guardian in possession, or by giving possession to the minor himself, if he is old enough to understand the transaction.

Gift to orphan minor, how completed.

Baillie, 530 ; Hed. 484. The words in the Hedaya are : " if he is endowed with reason, *because such an act is for his advantage* "; from which I infer that only capacity to understand that it is gift is required, and not full contractual capacity.

304A. When the subject-matter of gift is in the hands of the donee as bailee, it is not necessary for him to go through the form of taking fresh possession in order to effect the transfer of ownership. But the mere collection of rent from a particular property by an agent does not constitute such possession on the part of the agent as to enable him to acquire the property by way of gift from his principal without formal delivery.

Gift to bailee.

Baillie, 514, as construed by the Court in *Valayet Hossain*, 5 C. L. R., 91 (1879).

305. Writing is not necessary to the validity of a gift of either movable or immovable property.

Writing not necessary.

Kamarunnissa, 3 All., 266 (1880). The donor in that case gave the whole of his revenue-paying lands to his wife by oral declaration in the presence of seven witnesses. It is true that he stated the gift to be in lieu of dower due to his wife, in which case it would not have been, strictly speaking, a gift at all ; but the Privy Council held that, whether the dower was really due or not (which was matter of dispute), the gift having been followed by transfer of possession was valid as such. The acts of possession consisted in paying the Government

revenue and obtaining a decree of ejectment against a tenant In point of fact, nearly all the disquisitions concerning gifts and wills in the Muhammadan law-books proceed on the assumption that the business is transacted by word of mouth.

Gift of property out of possession cannot be made directly.

306. Where the subject of the gift, being some kind of incorporeal property or an actionable claim, is not susceptible of physical possession, the gift may be completed by any appropriate method of transferring all the control that the subject-matter admits of.[1] But the ownership of tangible property, of which the donor claims to be entitled to the actual present possession, cannot be transferred by way of gift, unless and until the donor obtains and delivers possession, or enables the donee to obtain possession.[2]

The remission of a debt by the creditor to the debtor (as distinguished from its assignment to a third party) operates simply as an extinction of the debt, and is not governed by the rules relating to gifts, as regards acceptance and transfer of possession.[3]

Where the subject-matter of a gift is in the possession of a trustee or agent of the donor, the custody of such trustee or agent is regarded in law as the custody of the donor.[4]

[1] *Anwari Begam*, 21 All., 165 (1896), at p. 170. " There is no doubt that the principle of Muhammadan Law is that possession is necessary to make a good gift, but the question is, possession of what ? If a donor does not transfer to the donee, so far as he can, all the possession which he can transfer, the gift is not a good one. There is, in our judgment, nothing in the Muhammadan Law to prevent *the gift of a right to property*. The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely, such right as he himself has ; but this does not imply that, where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely the *corpus* of the property. He must evidence the reality of the gift by divesting himself, so far as he can, of the whole of what he gives." See illustrations (*a*), (*b*), *c*).

[2] Macn. 201, Precedents of Gifts, Case 6. See illustration (*d*).

[3] Baillie, 522 ; *Jyani Begam*, 32 Bom., 612 (1908), a case of dower.

[4] *Fakir Mynar Muhammed Rowther*, 35 Mad., 120 (1912). It would appear therefore that if the trustee or donor in future holds the subject-matter for the donee, the delivery of possession is completed, provided all documentary or legal formalities are complied with.

Illustrations.

(a) A makes a gift to B of his landlord-rights over land in the occupation of tenants. The gift may be completed (subject to the law of registration) by A requesting the tenants to pay their rents to B,[1] or, in the case of zemindary rights held directly under Government, by mutation of names in the Collector's books.[2]

[1] *Mullick* v. *Muleka*, 10 Cal., 1112 (1884), at p. 1123. "We have been referred to several authorities, and amongst others to Door-ul-Mokhtar, Book on Gift, p. 635, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus when land is in the possession of a usurper (or wrong-doer), or of a *lessee* or mortgagee, it cannot be given away, because in these cases the donor has not possession of the thing which he purports to give. But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, have relation to cases where the donor professes to give away the possessory interest in the land itself, and not merely a reversionary right in it." Then, after suggesting another explanation, the Court proceeded: "Whether this is the real meaning of the authorities, may be doubtful; but it is certain that such a state of the law in this country would render the transfer by gift of a zemindari or other landlord's interest simply impossible; lands here are almost always let out on leases of some kind, and there are often four or five different grades of tenants between the zemindar and the occupying ryot. What is usually called possession in this country is not actual or *khas* possession, but the receipt of the rents and profits; and if lands let on lease could not be made the subject of a gift, many thousands of gifts, which have been made over and over again of zemindari properties, would be invalidated. If we were disposed to agree with this novel view of Muhammadan Law (which we are not) we think we should be doing a great wrong to the Muhammadan community by placing them under disabilities with regard to the transfer of property which they have never hitherto experienced in this country. Such a view of the law is quite inconsistent with several cases decided by the Sudder Dewany Adawlut (under the advice of the Kazis) and also by this Court, and it is directly opposed to the case of *Amirunnissa* v. *Abedoonissa* decided by their Lordships of the Privy Council" [reported as *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*, 23 W. R., 208 (1875); s.c. 15 B. L. R., 67 : L. R 2 Ind App., 87.]

See also *Ibhram*, 9 Bom., 146 (1884), cited above, where West, J., remarks (p. 150) that "when land is occupied by tenants, a request to them to attorn to the donee is the only possession that the donor can give of the land in order to complete the proposed gift."

[2] *Sajjad Ahmad*, 18 All., 1 (1895). Mutation of names is not, however, actually necessary, where there is other evidence of transfer of possession. *Muhammad Muntaz*, 11 All., 460 (1889), at p. 476.

(b) A makes a gift to B of a Government promissory note, according to the tenor of which the right to receive payment of the sum therein specified and interest passes by delivery and endorsement. The gift is complete as so on as the note has been endorsed and delivered to the donee.

Nawab Umjad Ally Khan, 11 Moo. I. A., 517 (1867), at p. 544. That this is not invalid as a gift to take effect *in futuro*, see under s. 314.

(c) A, having a deposit account at a bank, hands over to B the bank's receipt for the same, marked "not transferable," saying, "After taking a bath I will go to the bank and transfer the papers to your name." A dies before accomplishing his purpose. This is not a valid gift of A's claim upon the bank, and B takes nothing by it.

Aga Mahomed, 25 Cal., 9 (1897). Had the receipt been a document enabling the bearer to draw on the deposit account, the case would have been similar to illustration (*b*), and the gift would have been complete.

(d) A executes a deed of gift purporting to transfer to B the ownership of land actually in possession of X, but of which A claims to be owner, and for recovery of which he has instituted a suit. A dies while the action is still pending. The gift is void, and B has no *locus standi* to carry on the action against X.

Macn. 201, Case 6 of Precedents of Gifts. Contrast with this Case 10, p. 208, where the widows of two brothers, who had presumably been living together, executed a deed of gift of so much of their late husband's properties as might belong to them (either as heiresses or in right of dower), and authorised the donee to obtain possession. On this state of facts the opinion of the law-officers was that " although the widows, at the time of the execution of the deed of gift, were not seised of the property, yet if, agreeably to their desire, the donee, in pursuance of a judicial decree, became subsequently seised thereof, the fact of the donors having been out of possession at the time of making the gift is not sufficient to invalidate it."

The principle of Case 6 was applied in *Rahim Baksh*, 11 All., 1 (1888), to a case in which the subject of gift was the donor's unrealised share in the inheritance of a deceased relative, and the donee was expressly authorised to get his name entered in the revenue department and take possession of the property transferred. This the donee endeavoured to do, but had not succeeded when the donor died, and Mahmood, J., held thereupon that the gift failed for want of delivery of such possession as the subject-matter was capable of. On the other hand Case 10 was relied on by the P. C. in *Mahomed Buksh*, 15 Cal., 684 (1888), in support of their decision that where a mother, within sixteen days of her daughter's death, executed and registered a deed of gift, transferring her share of the inheritance to that daughter's infant children, and authorising them to take possession by their father as guardian (which could be done, and apparently was done, without any judicial decree), the gift was not vitiated by the fact of the donor herself not having had actual possession of the share at the date of execution.

Doubt as to equity of redemption.

307. It is unsettled whether or not a Muhammadan mortgagor can make a valid gift of his equity of redemption in property of which the mortgagee is at the time in possession.

Mohinudin, 6 Bom., 650 (1882), appears at first sight to be an authority for the negative, and is so treated in Ameer Ali's Muhammadan Law, Vol. I, p. 61. But a closer inspection of the case shows that this particular point was not really in issue.

The facts were that the plaintiff was seeking by this suit to prevent the mortgagee from attaching and selling the property in execution of a decree obtained by him against the original mortgagors, who had been at the time of the mortgage joint possessors thereof, as co-heirs, with Nur Bibi, the lady from whom he derived title. That lady's deed of gift to him was subsequent to the mortgage, and also subsequent to a decree in a partition-suit allotting certain land, of which the mortgaged land formed part, to her as her share of the inheritance, under which decree the land so allotted had been marked out with pegs by an officer of the court as belonging to her, but the mortgagee had not been disturbed in his possession of the mortgaged portion thereof. Had the plaintiff simply asked to be allowed to redeem the property, or to have the surplus proceeds of sale (if any) handed over to him, as transferee of the equity of redemption, the question above stated would have been the main issue before the Court. But as he claimed to stop the sale and to be put into possession of the land, without paying off the mortgage, it was incumbent on him to show, both that Nur Bibi's rights passed to him under the deed of gift, and that she was entitled to, and had in fact, possession of the land as against the mortgagee. Granting that, according to the Muhammadan Law as stated in s. 187, *ante*, her co-heirs had no right to mortgage the family property without her concurrence, and that she might have ejected the mortgagee from possession by a suit properly framed for

that purpose, it is clear that she had in fact done nothing of the kind, either before or after the deed of gift, nor had the plaintiff done so in her lifetime by her authority. What, therefore, the Bombay High Court really decided, by a majority of two judges to one, was the proposition embodied in the second clause of the preceding section. They were not called upon to decide whether a bare equity of redemption *being a kind of property not susceptible of physical possession*, could be validly transferred by appropriate words of gift; though an opinion in the negative may no doubt be inferred from the language of Melvill, J., quoted in the reporter's headnote :—" it must therefore be held that at the time of the gift Nur Bibi was simply the owner of the property which was in the possession of a mortgagee."

This view, according to Mr. Justice Ameer Ali, " is founded upon an erroneous apprehension of the Hanafi Law, under which seisin is requisite for hypothecation. According to the correct view of the Hanafi doctrine on the subject, there is nothing in it to preclude the mortgagor from granting his equity of redemption to another. On the contrary, under the law relating to *hawalat* (Hed. 332), the debtor may transfer his liability to another. And, as the property forms the security for the debt, the transferee obtains the right to redeem the property subject to the payment of the debt. But, when the property is not in the hands of the mortgagee, as is usually the case in this country, and is only burdened with certain debts which are secured upon it, the mortgagor is perfectly entitled to make a disposition thereof."

When, however, it is observed that, according to the passage of the Hedaya above referred to, *the transfer of the debtor's liability requires the consent of the creditor*, the whole argument falls to the ground. A stronger argument against the Bombay *dictum* from the modern Anglo-Muhammadan point of view is that the Durr-ul-Mukhtar, as cited by the Calcutta judges in *Mullick* v. *Muleka* (see above, p. 343), speaks in the same breath of property in the hands of *usurpers*, *lessees*, and *mortgagees*, as alike incapable of being given away for want of seisin in the donor, so that if the restriction has been treated as obsolete in respect of one of these it may well be so in respect of the others. The Bagdad lawyers may have intended it to be taken literally in all three cases, regarding the power of donation chiefly as a loophole for evading the laws of inheritance, and wishing therefore to confine it within the narrowest possible limits. But if that was their view it is certainly not law for British India, where the validity of gifts of zemindaries and other landlord rights has been established by a course of practice going back to quite the early days of British rule; and the only question left to be determined is, whether the equity of redemption vested in a mortgagor out of possession should be classed with such rights as these, as property not in its nature suceptible of seisin, or with a mere right of action against an alleged wrongful possessor which appears not to be directly transferable by gift (s. 306, *ill.* (*d*)). It differs from landlord rights in being purely reversionary, not involving any present enjoyment, while it differs from a mere right of action against an alleged usurper in that the obstacle to immediate possession is the acknowledged right of another, and not a mere matter of dispute.

In *Rahim Baksh*, 11 All., 1 (1888), at p. 10, Mahmood, J., remarked incidentally, referring to the case of *Mohinudin*, " I may respectfully say that it probably carries the rule as to seisin too far, as is suggested by a Muhammadan lawyer, Mr. Syed Amir Ali of the Calcutta Bar, at page 70 of his Tagore Law Lectures for 1884." As above remarked, it was not really the *decision* of the Court, but the *dictum* of Melvill, J., which carried the rule so far, and the *dictum* of Mahmood, J., on the other side may be said to redress the balance. In 1899, however, the point was again raised before the Bombay High Court, and was this time directly in issue, and the decision was against the validity of a gift of this kind; *Ismal* v. *Ramji*, 23 Bom., 682. It was not, however, a Full Bench decision, and the authorities do not appear to have been very throughly examined. *Mohinudin's*

case was erroneously treated as a direct authority, the other cases cited turned on quite different points, and the opinions of those two learned Muhammadans, Ameer Ali, J., and Mahmood, J., were not noticed at all. I have therefore left the statement in the text as it stood in the first edition.

Gift of "Mushaa" invalid.

308. The gift of an undivided share in any property capable of division is, with the exceptions mentioned in sections 310, 311, and 311A invalid[1] (*fasid*) as it stands, though it may be rendered valid by subsequent separation and delivery of a specific portion of the property.[2]

Illustrations.

Land cannot be given without the crop then standing on it, nor a palm-tree in bearing without its fruit, nor a house or vessel in which there is something belonging to the donor without its contents.[3]

[1] Macn. 50, 200; Baillie, 508-512; Hed. 483. From the latter work we learn that the objection on the ground of being *mushaa* (confused or indefinite) was not received at all by the school of Shafei, but was maintained by "our doctors" for two reasons:—namely, that (1) "seisin in cases of gift is expressly ordained, but a complete seisin is impracticable with respect to an indefinite part of divisible things, as it is impossible to make seisin of the thing given without its conjunction with something that is not given"; and that (2) "if the gift of part of a divisible thing, without separation, were lawful, it must necessarily follow that a thing is incumbent upon the giver which he has not engaged for, namely, a division, which may possibly be injurious to him." In *Muhammad Mumtaz* v. *Zubaida*, 11 All., 460 (1889), reported also in L. R., Ind. App., 205, as *Sheikh Muhammad* v. *Zubaida*, the Privy Council remarked: "the doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules." And in one Madras case one of the judges refused to recognise the doctrine of *mushaa* at all; holding that the rules of the Muhammadan Law of Gifts were only to be applied in the Madras Presidency as matter of "justice, equity, and good conscience," and that it would not be equitable to hold the gift in question invalid because of indefiniteness. *Alabi Koya*, 24 Mad., 513 (1901). But this doctrine was repudiated in the later case of *Vahazullah*, 30 Mad., 519 (1906): and still more recently in *Ibrahim Goolam Ariff*, 35 Cal., 1 (1907), the P. C. assumed the law of *mushaa* to apply to the succession of Muhammadans residing in Rangoon, but considered that it would be inconsistent with the above quoted ruling of their predecessors "to apply a doctrine, which in its origin applied to very different subjects of property, to shares in companies and freehold property in a great commercial town."

[2] Hed. 483:—"If a person makes a gift to another of an undefined portion of land (such as a half or a fourth), such gift is null, for the reasons already set forth; if, however, he afterwards divide it off, and make delivery of it, the gift becomes valid; because a gift is rendered complete by seisin, and in this case nothing else remains indefinitely involved with the gift at the time of seisin."

[3] Baillie, 508. "Hence the gift 'of land without the crop then standing on it,' or 'of a palm-tree in bearing without its fruit' and *vice versâ*, is unlawful. So also of a house or vessel in which there is something belonging to the donor without its contents." But the words "and *vice versâ*," must be limited by what is said on p. 520, *viz.*, that "if a man should give the crop on his land, or the fruit on his tree, *and direct the donee to reap or to gather it*, and he should

do so, the gift would be lawful on a favourable construction, but if he is not permitted to take possession, and does so, he is responsible." In other words, the gift does not of itself imply permission to separate the thing given from what is not given, but with express permission it is valid, whereas in the converse case of the donor reserving to himself the standing crop while giving the land, it would be for him rather than for the donee to effect the separation.

See also Macn. Prec. Gifts, case 21, Q. 4, p. 231.

309. The gift of an undivided share in anything which does not admit of a partition, or is of such a nature that it can be used to better advantage in an undivided condition, is valid.

Where the subject is incapable of partition.

Hed. 483 (after the passage corresponding with the preceding section). "It is otherwise with respect to articles of an indivisible nature, because in those a complete seisin is altogether impracticable, and hence an incomplete seisin must necessarily suffice, since this is all that the article admits of; and also because in this instance the donor does not incur the inconvenience of a division."

The instances given in Baillie of indivisible things are: a small house or small bath, p. 512. In *Kasim Husain*, 5 All., 285 (1883), a staircase, privy, and door were used in common by the occupants of several adjoining houses, and it was held that a gift of one of the houses, together with the owner's interest in these appendages, was valid as to both.

310. One of two [or more] co-sharers in any property may give his undivided share to the other [or to one of the others, as the case may be].

First exception.

Macn. Precedents of Gifts, case 13, Q. 1, p. 212. In this case one of two joint proprietors of an estate had made over his share to the other, and the law-officers held that "in this instance the objection of indefiniteness, arising from a confusion of several interests, which renders a transfer invalid, does not exist." But they added, "this supposes that there was no other person possessing a proprietary right in the property transferred, except the donor and the donee." The first case in which this precedent was followed, *Ameena* v. *Zeifa*, 3 W. R., Civ. Rul., 37 (1860), was strictly on all fours with it, there being only two joint proprietors concerned; the donor and the donee.

The words enclosed in brackets represent an important enlargement of the exception, resting on a single modern decision, but a decision of the highest tribunal. In *Mahomed Buksh*, 15 Cal., 684 (1888), the condition insisted on in Macnaghten's Precedent was not fulfilled. It was a gift by a mother of her unrealised one-sixth share in her deceased daughter's estate to the children of that daughter, who were not the only heirs of the latter, there being also a husband. But their Lordships would not admit that this made any difference. "If one of two sharers may give his share to the other, what is to prevent one of three giving his share to *either of the other two?*"*

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* In the reporter's head-note it is "*to the other two*," and this led me in the first and second editions to overlook the existence of the husband, and to treat the variation from the older rulings as more trifling than it really is.

Second exception.

311. The right to receive, and to collect separately, a definite share of the rents of undivided land, is not regarded as undivided property, and may be the subject of a valid gift.

In *Ameeroonissa* v. *Abedoonnissa*, L. R., 2 Ind. App., 87 (1875), the question was raised but not decided. However, in *Jiwan Buksh*, 2 All., 93 (1800), and again in *Kasim Husain*, 5 All., 285 (1883), referred to above on another point, it was distinctly laid down that the objection of *mushaa* was inapplicable to such cases. See also *Mullick* v. *Muleka*, 10 Cal. 1115 (1884), at p. 1126.

311A. A gift of a share in a holding, the donee being admitted to joint possession with the donor and recognised by the donor as being in such possession, is valid.

Abdul Aziz, 38 Cal., 518 (1911). The subject in question was a four annas share in a Kaimi rayati holding, and the donor had recognised the donee's joint possession with himself for 14 years. The decision was based not only on grounds of equity but on the ground that the doctirine of *mushaa* did not apply to such a case.

Gift of undivided thing to two persons.

312. A gift of a thing capable of partition to two persons is valid according to nearly all authorities, even without separate possession of their respective portions, if the donees are poor persons and if it is made from a religious motive (*sadakah*).

Such a gift made in the ordinary way of private friendship (*hiba*) is invalid (*fasid*) unless and until separate possession is obtained by each donee of his own portion.

But the authorities are conflicting—

(1) As to whether a gift to two rich men would have the same effect as a gift to two poor men, if made from a religious motive ;[1]

(2) As to whether the invalidity can be cured by possession of the separate portions being obtained at any subsequent period, or whether the division must be made prior to the delivery of possession.[2]

[1] Baillie, 516, 545 ; Hed. 485 ; Macn. Prec. Gifts, case 12, p. 211. The " two disciples " considered such a *sadakah* to be valid, even without separate possession, whether the donees were rich of poor ; Abu Hanifa, according to one of two reports preserved in the Hedaya, considered it tobe invalid in either case but according to the other report, of which the compiler remarks—" some have said that it is the more approved doctrine "—he held it to be valid if the donees

were poor, but not if they were rich. The Fatawa Alamgiri, as rendered by Baillie, mentions one report according to which A. H. agrees with the "two disciples" as to both cases, and another according to which he agrees with them only as to the gift to two poor men. In the case reported by Macnaghten the opinion of the law-officers was that the gift in question would be valid if the donees were poor, but not otherwise; the authorities on which that opinion was based are not specified.

[2] *For* the necessity of division before delivery of possession, Macn. Princ. Gifts, 7, p. 50, and Prec. Gifts, case 5, p. 201. In that case the division took place two or three months after the transfer; the law-officer of the Court of first instance advised that the original defect was cured by the subsequent division; but those consulted by the Sudder Court held that it was not.

Against, Baillie, p. 516, who refers to the above decision as having been passed on an imperfect representation of Muhammadan Law. The recent case of *Mohib-ullah* v. *Abdul Khalik*, 30 All., 250 (1908), is an authority on his side, but very unsatisfactory one, inasmuch as, though this precise question was distinctly raised by the facts, the judgment speaks throughout as though the dispute were simply as to the application of the general rule stated in s. 308, and takes no notice of any of the above-mentioned authorities. The Egyptian Code (Art. 509) agrees on both points with Macnaghten.

313. If a gift of tangible property is made subject to a condition inconsistent with full ownership on the part of the donee of the thing given, the gift is valid, but the condition void. Conditional gifts.

Exception.—If the condition is that the thing given shall belong absolutely to the donee in the event of his surviving the donor, but shall return to the donor on his surviving the donee, the better opinion seems to be that the gift is void altogether.

Illustrations.

(*a*) A house is given on condition that it shall not be sold. The restraint on alienation is void, and the house belongs absolutely to the donee.[1]

(*b*) A house is given to a person for life, on condition that it shall return to the donor, or his heirs, as the case may be, on the death of the donee. The donee takes an absolute interest, transmissible to his heirs,[2] and attachable in execution by his creditors.[3]

(*c*) The condition is the same as regards the property returning to the donor himself if he survives the donee, but in the contrary event the donee is to take it absolutely. The gift is void.[4]

(*d*) A husband transferred certain property to his wife in satisfaction of dower, with the conditions—

(1) That she should enjoy the profits thereof during her lifetime.

(2) That if she should die before her husband the dower debt should be deemed to have been paid off, so that her heirs should have no claim against the husband for any unsatisfied balance.

(3) That if she survived her husband, the property should be hers absolutely, whether or not there was any of the dower still unpaid.

The wife having survived the husband, the Court held that the third condition must take effect, leaving open the question whether the husband, if he had happened to survive the wife, could have availed himself of the second condition.

According to the "better opinion" above-mentioned, he could not, supposing the case to be governed by the Muhammadan Law of gift. But it was in fact, as counsel

pointed out, a *hiba bil iwaz*, or transfer for consideration, and it seems by no means clear that this would be governed by the same rules as gifts properly so called, or even that the Muhammadan Law would be applicable at all, under the Civil Courts Acts of British India.[5]

(*e*) A Muhammadan by deed conveyed immovable property to himself and other trustees for himself for life and after his death for the payment of certain amounts to private individuals (and charities); the settlor reserving to himself the power of revocation at any time. The gift is invalid.[6]

[1] Baillie, 537, only substituting a house for a female slave. Equally void, according to the same passage, would be a positive condition that the donee of the slave "*shall* make her an *umm-i-walad*," or "*shall* sell her to such a one," or "*shall* restore her to the giver after a month." See also *Cassamally Jarirajbhai*, 36 Bom., 214 (1911).

[2] Hed. 489. "An *Amree* (or life-grant) is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition." Presumably it would be the same *à fortiori*, if the gift were "to A for life and after his death to B."

In all the following cases the correctness of this statement was incidentally assumed, though it was not expressly decided in any of them.

In *Humeeda* v. *Budlum*, 17 W. R., 525 (1871), the Court intimated that "the creation of such a life-estate does not seem to be consistent with Muhammadan usage, and there ought to be very clear proof of so unusual a transaction;" and this was quoted with approval by the P. C. in *Abdul Wahid*, L. R., 12 Ind. App., 91 (1885).

In *Suleman Kadr*, 8 Cal., 1 (1881), at p. 7, the P. C. intimated (though here again in their view of the case it was not necessary for them to determine the point) that a gift of Government promissory notes, subject to a condition that the donee was to have the interest only for life, might perhaps be, according to Muhammadan Law, a gift to her absolutely, the condition being void. In 1887 the Madras High Court had to deal with a gift to a woman for her life, and after her death to her daughter and to the children born to that daughter. The daughter having pre-deceased her mother, leaving two children who were unborn at the date of the gift, the Court held at all events the grand-children took nothing *under the gift*, and observed that the suit was not so framed as to raise the question whether the daughter took a vested interest, and whether the grand-children could claim *as her heirs*. *Chekkonekutti*, 10 Mad., 196 (1886). See also *Nizamudin* v. *Abdul Gafur*, 13 Bom., 264 (1888), at p. 275; *Abdul Gafur* v. *Nizamudin*, 17 Bom., 1 (1892), at p. 5.

In *Amiruddaula*, 6 Mad. H. C., 356 (1871), the principle of this section was not actually necessary to the decision, because the gift was originally unconditional and was legally complete by virtue of the rule stated above (in s. 303) before the restrictive condition was proposed or agreed to; but the judgment is in fact so worded as to treat this latter fact as merely subsidiary, laying the main stress on the repugnancy of the condition to the gift.

[3] In the case last cited the contest was between the donor and the creditors of the donee (his son), who was dead, and to whom he asserted that he had given only a life-interest.

Where, however, the owner does not profess to make a gift, but simply gives permission to So-and-So to enjoy the usufruct of the property during his life, or for any shorter period, this certainly will not be construed as an absolute gift, but is said to operate as an *ariat*, or commodate loan; as such it would confer no transferable interest, and would apparently be revocable at the will of the "lender," unless there was consideration for the loan; *Mumtazunnissa* v. *Tufail Ahmad*, 28 All., 264 (1905), as explained on review in 30 All., 309 (1908), under the title *in re Khalil Ahmad*; see also Ameer Ali, M. L., vol. i, p. 109.

[4] Hed. 489, giving the preference apparently to the arguments of Abu Hanifa and Mudammad over those of Abu Yusuf.

[5] *Mahomed Shah* v. *Official Trustee of Bengal*, 36 Cal., 431 (1909).

[6] *Jainabhai*, 34 Bom., 604 (1910), A valid gift under Muhammadan Law must be unqualified and *in præsenti*, as remarked by Beaman, J. The learned judge, however, made some remarks about the validity of wakfs, which were too wide and which he qualified in *Cassamally Jairajbhai*, 36 Bom., 214 (1911). He also in the later case pointed out that the power of recovation is inherent in every Muhammadan gift except in certain conditions, in which the revocation clause (and not the gift if otherwise valid) would be void a gift to the donor himself for his life and then over to others would be bad *ab initio*. The parties in both cases were Khojas (Shiahs), but the questions were discussed on the basis of general Muhammadan Law.

314. A gift cannot be made to take effect at any definite[1] (or indefinite[2]) future period, except in the mode indicated in the following section.

Gift, *in futuro*, generally void.

[1] Baillie, 508 ; Macn. p. 50 ; *Amtul Nissa*, 22 Bom., 489 (1896). This rule is really only a corollary of the proposition (s. 301) that a gift must be accompanied by delivery of possession ; though in *Yusuf Ali*, 9 Cal., 138 (1882), they were referred to as two distinct rules of Muhammadan Law, either or both of which would be fatal to the validity of the deed in question, whereby a wife attempted to convey certain properties, without consideration, to herself for life, with remainder to her husband. In *Amtul Nissa* a husband executed a deed purporting to give to his wife and her heirs in perpetuity an annuity of Rs. 4,000 out of the future income of certain villages. Farran, J., said : " The law is express upon that subject. A gift cannot be made of anything to be produced *in futuro* although the means of its production may be in the possession of the donor. The subject of the gift must be actually in existence at the time of the donation.

Does this ruling conflict with the well-established validity of a gift of Government promissory notes (see illustration (*b*) to s. 306) ? No ; because there the subject of the gift is not the sum of money payable *in futuro* by the Government, but " the means of its production " (to use the learned judge's expression) in the shape of negotiable instruments actually delivered to the donee.

Nor does it conflict with the validity of a gift of a pension (not yet due) or of share in a trading company, or of a right or share in a right) to receive offerings at a Shrine. These are enforeable rights with a marketable value ; and a gift of them under Muhammadan Law is valid, provided that there is such an effective transfer of possession as they are in their nature capable of *Ahmad-ud-din*, 34 All., 465 (1912).

[2] *Chekkonekutti*, 10 Mad., 196 (1886), the facts of which are stated in the note to the preceding section. The judgment laid stress on the point that the deed of gift did not simply direct division on the death of the first donee between that lady's daughter and such of the children born to the latter as might be living at that date, but was so worded as to include as joint donees any after-born children. " Even granting that the seisin required by Muhammadan Law could be postponed by Pathuma and her children till the death of Mama, no one could make seisin for an indefinite number of future children." One might have supposed that this conclusion would follow *á fortiori* from the confessedly settled rule prohibiting gifts to take effect at a *definite* future period ; but the learned judges treated the point as " a novel one, and by no means free from difficulty."

Gift, of *corpus*, with reservation for life, generally valid.

315. If a person gives land or interest-bearing securities to another, on the understanding that the donee shall hand over to him, or dispose of according to his directions, the whole or part of the produce or income during the remainder of his, the donor's life, or some other life in being, it seems that both the gift (so called) and the reservation are valid.

Nawab Umjad Ally Khan, 11 Moo. I. A., 517 (1867). This was a Shia case, but the decision of the P. C. did not purport to rest on any peculiarity of the Shia Law. The subject of the gift was a number of Government promissory notes. It seems clear that if the reservation was valid with respect to them it would also be valid with respect to the produce of land.

The actual question at issue was the validity of the gift itself, not of the reservation, inasmuch as the dispute arose after the death of the donor, who was the father of the donee, and whose object had undoubtedly been to secure to his son after his death a larger portion than would fall to him by the laws of inheritance, without diminishing his own enjoyment of the income during his lifetime. The condition had been fulfilled and done with. And the validity of the gift was maintained on two alternative grounds, namely, that either (1) the thing to be returned, *i.e.*, the income, was something different from the thing given, so that there was no repugnancy; or (2) admitting the condition to be repugnant to the gift, "the Muhammadan Law defeats, not the grant, but the condition." The first of these positions is maintained by quoting from the Hedaya a passage which really relates to quite a different transaction; the second, more solidly, by the text quoted above, in note 2 under s. 313. But their Lordships, not satisfied with thus disposing of the issue, went on to intimate an opinion that "as this arrangement between the father and the son is founded on a valid consideration, *the son's undertaking is valid, and could be enforced against him in the Courts of India as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated.*

Here the ground seems to be entirely shifted, and the transaction to be regarded not as a gift, in the ordinary sense of the term, but as a transfer for consideration; in the language of Muhammadan Law, a *hiba bil iwaz*. But with submission, it seems hardly consistent with principle or with the ordinary use of language to treat the return of a part of a thing as consideration for the transfer of the whole, and the income accruing during the transferor's life from the property transferred is to all intents and purposes a part of that property.

Supposing it to be a transfer for consideration, the query in s. 299 would apply. And the same query will be equally appropriate to a later Privy Council decision, *Umes Chundar Sircar*, L. R., 17 Ind. Ap., 201 and 18 Cal., 164 (1890) which has been treated as affirming broadly the legality of gifts *in futuro* in the shape of voluntary settlements in favour of the settlor himself for life, followed by one or more vested remainders.

A gift of property, with a reservation that the donee should not have the power of transfer over one-third of the property during the life of S. K., the income of that third being set apart for the maintenance of S. K., was held to be valid, but the condition against alienation was invalid; the condition as to payment of a third of the income was valid and attached to the property in the hands of a transferee who had notice: *Lali Jan*, 34 All., 478 (1912). This was followed by the Bombay High Court in *Tavakulbhai*, 41 Bom., 372 (1916), the condition about payment of a portion of the income being treated as an

obligation in the nature of a trust, attaching to the property and binding on the transferee with notice.

316. A gift once validly made must be rescinded by a Civil Court on the application of the donor, unless the right of revocation is barred by one or other of the under-mentioned circumstances, namely— Revocation of gifts.

(1) The donee being related to the donor within the prohibited degrees of consanguinity ;

(2) The donee being, or having been, the husband or wife of the donor ;

(3) The death of the donee or of the donor ;

(4) The thing being lost or transferred by the donee, or being so changed as to lose its identity ;

(5) The thing having increased in value, whether by the act of the donee or otherwise, and whether by natural accretion, human labour, or change of situation.

(6) Something being given and accepted by way of return for the gift ;

(7) The fact that the motive for the gift was a desire to secure the favour of God, in this world or the next ;

The right of revocation is not barred by the fact of the donor having expressly waived it at the time of making the gift (unless there was consideration for the waiver, which would practically destroy the gratuitous character of the so-called gift itself).

Baillie, 524-528 ; Hed. 485. The bars to revocation enumerated in Baillie's Digest are here somewhat consolidated and re-arranged.

As regards the fourth bar, the Allahabad High Court has held that a Revenue court partition of villages, the subject of a deed of gift, does not amount to such a substantial alteration in the hands of the donee as would render the gift irrevocable : *Magbul Husain*, 36 All., 333 (1914).

As regards the sixth, a return either delivered or stipulated for at the time of the so-called gift would take the transaction out of the category of gift altogether, as the English term is commonly used and as it is defined in this chapter ; but the language of the Hedaya seems rather to point to a return neither given simultaneously nor expressly stipulated for, though desired and expected, in accordance with Oriental usage. " The object of a gift to a stranger is a return ; for it is a custom to send presents to a person of high rank that he may protect the donor ; to a person of inferior rank that the donor may obtain his services ; and to a person of equal rank that he may obtain an equivalent ; and such being the case, it follows that the donor has a power of annulment, so long as the

object of the deed is not answered." For this reason I have embodied it in the text of the present edition.

This seventh bar is not in Baillie's enumeration, because *sadkah* (charity) is treated in a separate chapter as being quite distinct from *hiba* (gift). The reason given in the Hedaya for its non-revocability is that the object is merit in the sight of God, and that has been attained ; thus confirming the view suggested by the passage quoted above, that the primary notion in *hiba* is that of establishing a claim on the donee for reciprocal good offices, though without any definite bargain. It is only in the case of gifts to near relatives, and more especially to children and to husband or wife, that the satisfaction of a natural sentiment, or relief from a moral responsibility, is regarded as an adequate return, so that revocation is unconditionally forbidden.

The Hedaya also mentions that the revocation of gifts is not allowed at all by the school of Shafei, except where the gift is by father to a son, in which case the revocability results from the tenet, peculiar to that school, of the former's inalienable *patria potestas ;* and that even the Hanafis, who hold it to be lawful, admit it to be " abominable," according to the saying of the Prophet, the retraction of a gift is like eating one's spittle." See s. 413, *post.* It is indeed, rather difficult to imagine a case in actual practice which would not be caught in the meshes of one or other of the above-mentioned exceptions.

In Case 7 of Macnaghttn's Precedents of Gifts, p. 203, a gift is said to be void because (among other reasons) of its having been retracted, and in the footnote it is said that "although, agreeably to Prin. Gifts, 13, a gift to a relation cannot generally be resumed, yet there is a special exemption made in the case of a donation from a father to a son or grandson, the resumption of which is declared to be allowable." But the learned commentator must have been thinking of the Shafei Law above noticed, it being quite clear from Baillie, p. 525, that in Hanafi Law there is no revocation of gifts to children or grandchildren.

In Case 14, p. 214, a mother and stepmother made a gift jointly to the daughter. The mother, after the death of the stepmother wished to revoke it ; but it was held that she was incompetent to do so, both by reason of the death of one of the donors and because of her being related to the donee within the prohibited degrees. See also Case 19, p. 223, which was a gift by grandmother to grandson. In Case 21, Q. 3, one law-officer is said to have given his opinion in favour of the validity of a resumption of a gift to which the objection of relationship did not apply, but he was overruled by the majority on the ground that the declaration of intention to resume must be express, not merely implied from mortgaging the subject of gift ; and there can be no doubt that they were right, according to the authorities which declare that the intervention of a judge is necessary to the validity of a revocation.

CHAPTER XI.

WAKF, OR CHARITABLE AND RELIGIOUS FOUNDATIONS.

Trusts for purposes which the law considers it for the public benefit to perpetuate for ever are called charitable trusts. This is the only general definition which can be given of the word charity.—*Tyssen, on Charitable Bequests*, p. 5.

317. Notwithstanding anything in ss. 276 and 313, arrangements may be made that the use of, and income accruing from, specified property shall be permanently devoted to specified objects, subject to the conditions hereinafter stated. Definition.

Such a permanent dedication is termed *Wakf*.[1] But it is not absolutely necessary to the validity of the endowment that this term should be used in the instrument creating it.[2]

Nothing in the Indian Trusts Act, 1882, is to affect the rules of the Muhammadan Law as to *wakf*.[3]

A property may be treated as *wakf* by user, without any evidence as to dedication.[4]

[1] Book XV of Hamilton's Hedaya is headed "Of *Wakf*, or Appropriations." The English word is merely the translator's rendering of the Arabic, and is not particularly felicitous, as it will suggest to most people the conversion into private property of something which was previously everybody's or nobody's. But Hamilton's lead having been followed by both Macnaghten and Baillie, the phrase has taken root in our Anglo-Muhammadan vocabulary, like "residuaries," "distant kindred," and some other more or less inapt equivalents. We shall escape being confused by it if we remember that the appropriation spoken of is not to a specific individual, but to a specific use or purpose, as when we speak of the appropriation of supplies by the House of Commons; but on the whole I have thought it better to substitute the word "dedication," except where I am actually quoting from writers who use the other term.

The phrase employed in the title of this chapter correctly represents the meaning of *wakf* as now cut down by British judges; it is not, and does not pretend to be, an adequate rendering of the term as used in the original law-sources. Mr. Baillie, who is content with "appropriation" so long as he is treating of *wakfs* for public purposes, finds the term so glaringly *inappropriate* when he comes to *wakfs* of another sort, that he substitutes (with due notice to the reader) the familiar English law-term "settlement" (p. 567). Had he used the more colloquial equivalent—"tying up"—he would have come still nearer to the original, as is shown by the following sentence of the Hedaya (not reproduced by Hamilton): "He (the Prophet) said, 'The word Wakf means "detention"

(*habs*), as if one should say, " The beast on which I was riding has come to a standstill " (*wakafat*), or, " I have pulled her up—made her stop (*awkaftu*)—because she was tired." ' " This exactly fits the rendering preferred by two French Arabicists—" immobilisation." But a little further on we have two metaphors emphasising the idea of renunciation by the proprietor himself, rather than of restraint imposed upon others ; *wakf* being compared by Abu Hanifa to a camel set at liberty in pursuance of a vow, and by the " two disciples " to an act of manumission. Underlying the difference of metaphor is a substantial difference of principle. The emancipation of a slave put an end once for all to the dominion of the master ; but the releaser of a she-camel did not cease to be her owner, and if he chose to break his vow by selling or working her, no human authority could interfere ; and so, according to Abu Hanifa, the ownership of the grantor did not cease, and the transaction was merely like an *ariat*, or loan for use, except for the absence of a determinate borrower, unless and until his ownership was extinguished by judicial decree, or (if made in the form of bequest) by his death. The two disciples, on the contrary, defined *wakf* as " the appropriation (or immobilisation) of any particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage resulting to his creatures." Hed. 231 ; comp. Baillie, 550. The last-mentioned view seems always to have prevailed in practice.

For purposes of the Mussalman *Wakf* Validation Act, VI of 1913, sec. 2 (1) of the Act defines *wakf* to mean " the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious, or charitable." This, however, must be read with secs. 3 and 4 of the Act, which are the chief operative sections, and for which see below, sec. 323 of this digest, and note 4 thereon.

Under the maliki view the dedication need not be permanent to constitute *wakf* the malikis allow a temporary *wakf*, even for so short a period as a single year, and hold that in any case the legal ownership remains in the endower and his heirs throughout, and is re-united with the right of actual enjoyment on the expiration of the specified term or on failure of the specified objects. See Perron, Jurisprudence Musulmane, vol. v, pp. 42, 45, 53, 56. In view of the words " permanent dedication " in the definition of *wakf* under Act VI of 1913 a temporary Maliki *wakf* would not be a *wakf* within the Act, but it would nevertheless be valid under the saving provision of the Act in sec. 5, which runs : " Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect."

[2] *Jewun Doss Sahoo*, 2 Moo. I. A., 390 (1840), at p. 418. The deed in this case was called an *Altamgha-enam*, that is a royal grant of rent-free land. It had been renewed by several Mogul sovereigns in succession to different ancestors of the plaintiff, and in each case, though the word *wakf* was not used, the object of the grant was expressed to be for defraying the expenses of a certain Khankah (monastery) in honour of the saint from whom the grantees were descended. The judgment was partly based on two earlier decisions of the Sudder Dewanny Adawlut, *Kulb Ali Hoossein*, 2 Sel. Rep., 110 (1824), and *Kadira*, 3 S. D. A., 407, (1825). See also *Piran*, 19 Cal., 203 (1891), at p. 216 ; and as to Shia Law *Saliq-un-nissa*, 25 All., 418 (1903).

[3] S. 1 of Act II of 1882. The Act is called An "Act to define and amend the law relating to Private Trusts and Trustees. "

[4] A piece of land near Multan City was used for centuries as a grave-yard by Muhammadans because of the proximity of the graver of a female saint Mai Pak Daman. There was no evidence of dedication. The Privy Council held that the land was *wakf* by user, if not by dedication : *Makhdum Hassan Bakhsh*, 48 Panj. Rec., 83 (1913)., *s. c.* Court *of Wards* v. *Ilahi Bakhsh*, L. R., 40 I. A., 18(1912).

318. The property dedicated must be of a reasonably permanent character, but it is not absolutely necessary that it should be immovable. What property may be the subject of wakf.

(1) Working cattle and implements of husbandry (as accessories to agricultural land, but not otherwise) ;

(2) Korans for public reading in a mosque,* and probably other books ; and

(3) Other movable articles not necessarily consumed in the using, where the dedication of such things is sanctioned by custom,

may be made subjects of *wakf*.[1]

(4) As to money, and consequently as to shares in joint-stock companies and other modern forms of investment, the High Courts of Calcutta and Allahabad have given conflicting opinions.[2]

[1] Baillie, 561, 562 ; Hed. 234-5, quoted in *Kaleloola*, 18 Mad., 201 (1894), at p. 209. These passages also sanction (without difference of opinion) the "appropriation" (*i.e.* dedication) of slaves as accessories to agricultural land, and of horses, camels, and armour for the special purpose of war against the infidel, both of which forms of endowment are of course inadmissible in British India.† Clause (3) represents the opinion of Muhammad, which is opposed to that of Abu Yusuf ; but we are told that "most lawyers have passed decrees according to the opinion of Muhammad in this particular."

[2] In the Calcutta High Court there was first a decision in the negative, passed by a single judge without much argument, *Fathima* v. *Ariff Ismailjee Bham*, 9 C. L. R., 66 (1881) ; then an unreported ruling by two judges in the affirmative (*Sakina Khanum* v. *Luddun Sahiba*, Reg. App. 110 of 1900), and finally an elaborate ruling by Woodroffe, J., following the first-mentioned decision, and both distinguishing and dissenting from the second ; *Kulsom Bibee* v. *Golam Hossein*, reported only in 10 Calcutta Weekly Notes, 449 (1905).

The Madras High Court has held that the right to recover money under a decree cannot be made the subject of a *wakf* in the absence of a custom authorising such appropriation-*Kadir Ibrahim Rowther*, 33 Mad., 118 (1909). But that does not carry us very far. Obviously it is problematical whether any money would actually be recovered at all under the decree, and if so, how much. On the other hand definite sums of money in hand, or shares and securities, such as are referred to in sub-section (4) above, are permanent property or as any note can be converted into permanent property.

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* Compare the chained Bibles formerly kept in English churches.

† It may be said that a war-horse is eminently an article likely to be consumed in the using ; but the lawyers did not know how to get over two generally received sayings of the Prophet to the effect that two of his companions had "dedicated" their horses and armour "in the way of God." It would have been out of their line to suggest what is probably the true explanation, namely, that in the Prophet's time the word used by him had not yet acquired its technical signification.

In the Allahabad High Court there has been one decision in the affirmative, *Abu Sayid Khan*, 24 All., 190 (1901), expressly dissenting from the first Calcutta decision, and in its turn noticed and disapproved at the last.

The controversy was started by a passage in Ameer Ali's Mahomedan Law, Vol. I, pp. 202-207, in which that learned writer set out numerous extracts from previously untranslated Arabic authorities, from which it was made to appear that, since the date of the Hedaya, a *wakf* of money had come to be expressly recognised, and proceeded as follows :—" From these principles it will be seen that under Hanafi Law the *wakf* of Government securities, shares in companies, debentures, and other stock, is perfectly lawful and valid. The doubt, which one or two of the ancient Hanafi doctors had expressed as to the validity of the *wakf* of certain kinds of movable property in contradistinction to certain other things, was the outcome of primitive and archaic conditions of society, and was founded on the notion that, as perpetuity was essential to the validity of *wakfs*, it could hardly be secured by the dedication of movable things generally. But as the Mussulman communities progressed in material civilisation and commerce developed, it came to be recognised universally that ' the *wakf* of everything which forms the subject of business transactions, or which it is customary in any particular locality to do so,'* is valid." In the second edition of this work it was pointed out that in one respect the very authorities quoted by Ameer Ali, J, rather militated against his conclusion. In asserting the validity of a *wakf* of money, they have only two modes to suggest in which it can be utilised without consuming the capital. One is to lend it to the poor and take it back again (evidently without interest), and the other is to invest it in *muzaribat*, *i.e.*, a partnership in which one supplies capital and the other labours and the profits are shared between them. Now, the very reason why this form of contract receives so much attention from Muhammadan lawyers is that it represents one of the few ways in which capital can be profitably invested without incurring the guilt of usury. But this guilt is incurred, according to old fashioned orthodoxy, certainly by debenture-holders and holders of Government stock, who personally lend money at interest,† and I suppose by depositors in a bank, since they know that their money is to be employed in money-lending ; not, perhaps, necessarily, but usually in practice, by ordinary shareholders in commercial companies ; and the sin would seem to be aggravated by the fact that God Himself is theoretically the owner of *wakf* property. Against this, however, was the fact that, according to D'Ohsson, the sacred law as understood in Turkey makes a special exception in the case of *wakfs* to the general rule against usury, permitting the *mutawali* either to borrow at interest when there is no surplus income available for urgent repairs, or to lend surplus income at interest, provided that the rate does not in either case exceed 15 per cent. (Tableau Général, vol. ii, p, 550). And in view of the Allahabad ruling delivered in the meantime, the statement that this " seemed to be the better opinion " was allowed to stand as in the first edition. In the case of *Kulsoom Bibee*, however, the new authorities adduced by Mr. Ameer Ali were re-examined with the aid of fresh translations, from which it appeared that instead of " the *wakf* of everything which forms the subject of business transactions " we ought to read " everything which it is the practice to make *wakf* of," in each of the texts in which the expression occurs. After giving his reasons for accepting this rendering as the correct one, Woodroffe, J., proceeded to argue from passages in Mr. Ameer Ali's own work that there had not been, and could not be, since the date of the Hedaya, " a progress from the limited definitions of the ' two disciples ' to an unlimited rule which makes everything the

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* *Sic.* That for " do so " we should read " make a *wakf* of," appears from the quotations on the preceding page.

† Baillie, however, remarks (p. 562, note) that this by no means uncommon for Mussulmans in India to take interest in this way. It is also arguable that joint-stock companies and modern banks are a development of the principle of *Muzaribat*.

subject of *wakf* which is capable of possession." . . . "After a very careful consideration of the matter I am fully satisfied that the translation which is tendered on behalf of the plaintiffs, which harmonises all the authorities and brings them into agreement with the Hedaya, is the correct one; and that, excluding Zafar, the teaching of the great Mujtahids, which was followed by later jurists, is that, unless a movable is accessory to land, or allowed because of certain traditions concerning the prophet and the sacred writings, or there is a custom to make *wakf* of it, it cannot be lawfully appropriated. And if the opinion of Abu Yusuf is to prevail over Imam Mahomed (a point which I do not decide), then no exception exists even in favour of custom, assuming that there were (as there is not) any proof of a custom to appropriate in this case." The learned judge said in conclusion that "he should have been glad if he could have affirmed the broad principle contended for, but that he had to determine the case according to what he found the law to be, and not according to what he might conceive that it should be."

It might still be open to argument whether, if the ancient jurists could have foreseen the modern facilities for the permanent investment of trust-funds in "gilt-edged" securities, they would not have assimilated these to immovable rather than to movable property, were it not for the difficulty (already noticed) of reconciling any of these investments with their strict interpretation of the Koranic prohibition of usury.*

As to the effect of a mortgagor dedicating his equity of redemption, see *Hajra Begum* v. *Khaja Hossein*, 12 W. R., 344 and 498 (1869); s. c. 4 B. L. R., A. C., 86.

The words "*any* property" in sec. 2 (1) of the Mussalman *wakf* Validating Act (VI of 1913), are wide enough to cover all movable and immovable property including stocks, shares, interest bearing securities, etc. As drafted originally the Bill expressly mentioned these in a definition, but it was pointed out that this would be repugnant to Muhammadan Law. The definition of property was therefore omitted. The question, therefore, whether securities can be the subject of *wakf* remains where it was before the Act was passed, for the words "any property" of sec. 2 (1) are restricted by the words "which *in all other respects* is in accordance with the provisions of Mussalman law in sec. 3 of the Act."

319. A dedication by way of *wakf* may be made either by act *inter vivos*, or by will. But if it is made by will or death-bed gift it is subject to the same restriction as a bequest in favour of an individual, namely, that it cannot operate upon more than one-third of the net assets, unless the

Testamentary *wakf*.

* In the 5th edition (1906) of his "Student's Handbook," Appendix X, Mr. Ameer Ali criticises the above judgment, re-asserting the correctness of his own translations, and stating that the *wakf* of money invested in stock or business is now universal among Muhammadans from Algeria to India and Burma. He tells us further that the shrines at Mecca and Kerbela, and many of the mosques and religious institutions all over India, are largely supported by the income of moneys invested in Government securities. If so, it means that the authorised guardians of the faith are everywhere repudiating the rule against lending money at interest, a doctrine which was surely accepted by all the primary authorities appealed to in this controversy—by Muhammad and Zafar equally with Abu Yusuf—and in that case all this nice balancing of their opinions on a subordinate question seems rather futile. M. Clavel tells us that the Court of Algiers has adopted successively five different opinions on this vexed question. "*Wakf ou Habous*," vol. i, p. 198. Mr. Justice Abdur Rahim, Muh. Jur., p. 308, inclines to the view that the juristic opinions adverse to this form of investment, being based on analogical deduction and not on any positive text, should not be literally followed as they are obviously unsuited to modern conditions.

heirs consent.[1] A merely contingent appropriation to religious or charitable wills is invalid as *wakf*.[2]

Baillie, 550, 602; Hed. 233; Macn. x, 2, p. 69.

Baboojan, 10 W. R., 375 (1868).

As regards the validity of *wakfs* made in death-illness only to the extent of a third, unless assented to by the heirs, the same rule holds good in Shia Law: *Ali Husain*, 36 All., 431 (1914).

As to the one-third limit for bequests, see s. 270. In *Jaun Bebee* v. *Abdollah Barber*, Fulton, 345 (1838), it was contended that this restriction applied to a *wakf* made while the grantor was in ill health, and not in the form of a testamentary deposition, but by the terms of which she reserved to herself a life-interest in as much of the produce as she might require for her own use; but this contention was negatived, in accordance with the opinion of the Court maulawis. It would have been otherwise, according to them, if she had said, "This *wakf* is not to take effect until after my death."

[2] *Cassamally Jairajbhai*, 36 Bom., 214 (at p. 258) (1911) such a contingent gift would also be invalid as a private gift for want of a donee's possession. See also *Jainabai*, 34 Bom., 604 (1910). A *wakf* with a reservation of the donor's life-interest or other limited interests in usufruct is good, because the corpus is there and then definitely and finally appropriated to its intended purpose (Beaman, J. in *Cassamally;* as above). This would apply to *wakfs* created both before and after 1913, except that in the former case there would have to be dedication of a substantial portion of the property to pious and charitable uses. (see sec. 323 below).

Wakf how completed.

320. A dedication *inter vivos* is complete and irrevocable as against the endower, either when a Civil Court has so decreed, or when possession has been delivered by the endower to the *mutawalli*, accompanied by a declaration of the trusts of the endowment; or in the case of a mosque, when it has been physically separated from the endower's property, and prayer has been said in it with his permission, and similarly with other things dedicated to public uses, such as cemeteries, caravanserais, and aqueducts.

Baillie, 550 and 591; Hed. 232. It would seem that according to Abu Hanifa the only way of making a *wakf* irrevocable before the death of the founder is to obtain a decree to that effect in a fictitious suit. [Compare the *in jure cessio* of Roman Law, and the "fines" of old English Law.] The two disciples, on the other hand, agree in regarding perpetuity as the essence of *wakf*, and in repudiating the necessity for a decree to establish it, but differ as to the precise moment at which the right of the appropriator ceases and the perpetuity commences, in cases where the transaction is *inter vivos*. Abu Yusuf considers that the mere declaration of intention, orally or by writing, is sufficient; Muhammad, that there must be actual delivery of possession to a *mutawalli*, or trustee. Muhammad's opinion, being stated last, is probably that of the compiler of the Hedaya, and it was affirmed in *Muhammad Aziz-ud-din*, 15 All., 323 (1893). An early decision the other way, *Doe d. Jaun Bebee* v. *Abdoollah*,

Fulton, 345 (1838), does not seem to have been brought to the notice of the Court.*

The declaration of trust must be absolute, that is, not contingent on any uncertain event, such as the death of the endower without issue ; *Pathukutti* v. *Avathalakutti*, 13 Mad., 66 (1888).

There are some old rulings to the effect that " heritable property " (whatever that expression may mean in this connection) may under Muhammadan Law be burdened with a trust of a religious nature, such as maintaining the tomb of a saint, without becoming *wakf*, and that it may then be alienated subject to the trust. See *Kuneez Fatima*, 8 W. R., 313 (1886) ; *Fultoo* v. *Bhurrut Lall Bhukut*, 10 W. R., C. R., 299 (1868). But these cases appear to be inferentially overruled by the decision of the Privy Council in the case of *Bishen Chand Basawat*, 15 Cal., 329=L.R., 15 Ind. App., 1 (1887), in which property burdened with a trust of this nature was held not to be attachable by personal creditors of the trustee, as of course, it would have been if he could have alienated it subject to the trust. " If," said Sir Barnes Peacock (p. 339), " this property is to be sold, it must be taken out of the hands of the trustee altogether and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might be of any other religion... .Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Mahamedan Law ? For example, that a Hindu might be substituted for a Mahumedan trustee for the purpose of providing funds for the Mohurrum, and taking care that it should be duly and properly performed, when it is well known that disputes and bitter feelings frequently exist between Hindus and Mahomedans at the time of the Mohurrum ? "

As to mosques, etc., see Baillie, 604, 609, and *Yakoob Ali*, 6 N. W., 80 (1874).

As to testamentary *wakf*, both the Hedaya and the Fatawa Alamgiri seem to say that, according to Abu Hanifa, and therefore *à fortiori* according to the two disciples, such a *wakf* is completed by the death of the testator, to the extent of a third of his property (Hed. 233 ; Baillie, 550). But this can only be in the same sense in which it is said that an ordinary legatee becomes joint owner with the heirs from the death of the testator. No specific property can pass into the ownership of the legatee in the former case, or become divine property in the latter case, until it is ascertained that its value does not exceed the bequeathable third, and one would suppose that this must be evidenced by some act of delivery or relinquishment on the part of the heirs. But all we are told is that " *if there be no other property*, and the heirs do not allow the appropriation, the *produce* must be divided into three parts, and one-third set apart for the *wakf*."

Wakf of undivided property.

321. Contrary to what is stated in s. 308 as to *Gifts*, the balance of authority seems to be in favour of allowing *wakf* of an undivided share, even in property capable of division ;[1] but it is agreed that the dedication of undivided property, whether naturally divisible or not, for a mosque or burying ground is invalid.[2]

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* See Mulla, P.M.L., p. 92, where it is suggested that the Allahabad decision might have been different if the settlor had spent the income of the property in accordance with the deed. But unless he had appointed himself *mutawalli* under the deed (which he had not done), that would have been a violation, not a confirmation, of the *wakf* ; and if he had appointed himself the first *mutawalli*, no formal delivery of possession, from himself to himself, would have been necessary even according to Muhammad.

[1] The difference between Abu Yusuf and Muhammad on this point follows naturally from their divergence, noticed under the preceding section, as to whether *wakf* can be consitituted by mere declaration of intention without transfer of possession to a *mutawalli*. But the Fatawa Alamgiri, which on that question declared that opinions were equally balanced (Baillie, 551), says nevertheless (B. 564), that on this point " the moderns decide according to the opinion of Abu Yusuf, and that is approved." And M. Clavel tells us that such *wakfs* are common in modern Egypt. Droit Musulman, Wakf ou Habous, vol. i, p. 222.

[2] Abu Yusuf concurred with Muhammad as to the mosque or burying ground, " because the continuance of a participation in anything is repugnant to its becoming the exclusive right of God ;" and also, " because the present discussion supposes the place in question to be incapable of division as being narrow and confined, whence it cannot be divided but by an alternate application of it to different purposes, such as its being applied one year to the interment of the dead and the next year to tillage, or at one time to prayer and at another time to the keeping of horses—which would be singularly abominable." Hed. 233.

Wakf of property to which the title subsequently fails.

The wakf of property in which the dedicator's titles subsequently fails was held to be invalid, per Griffin, J. in *Masih-ud-din*, 35 All., 68 (1912) ; but on this point some doubt seems to have been felt by Chamier, J. It was suggested in argument that the *wakf* attached to the money, the price paid by the purchaser, who remained in possession 8 years before he made the *wakf*, but this argument was not accepted. The passage cited by the court from Mr. Ameer Ali, M. L. Vol. I. 134 insists on the necessity of the dedicator being in lawful possession when he makes the *wakf* ; but he can hardly be said to be in unlawful possession when he purchases property whose vendor's title afterwards turns out to be defective. The purchaser took an indemnity bond for title ; but it was held that the *mutawalli*, as such, after the purchaser's death, could not sue on it.

Proper objects of *Wakf*.

322. All works of religion, charity, or public utility, not condemned by the Muhammadan religion, are proper objects of *wakf*.[1] But the particular objects intended must be indicated with a reasonable degree of precision, in order that the Courts of British India may give effect to the endowment.[2]

[1] Among the public objects incidentally noticed in the books are mosques and provision for *imams* to conduct worship therein ; colleges, and provision for professors to teach therein ; aqueducts, bridges and caravanserais ; distribution of alms to poor persons ; assistance to enable poor persons to perform the pilgrimage to Mecca ; and a house on the infidel frontiers for the accommodation of Mussulman warriors in their excursions " (Hed. 240).

It is remarkable that the Muhammadan Law protects endowments by *zimmis* for the benefit of their co-religionists, and it is even said that " if [a *zimmi*] should make the *wakf* to his son and his descendants [as to this see the next section], and then to the poor, *on condition that if any of his children become Mooslims they shall be excluded from the charity*, the condition would be binding ; and so also if he should say, ' whoever turns to any other religion than the Christian is excluded,' regard would be had to the condition." But endowments by Christians for erection or even repair of Christian Churches were apparently illegal, as would be an endowment for " superstitious uses " even now in England; and any endowment for worship according to a creed different from that of the

endower was void, even if it were in favour of the religion of Islam (Baillie, 552, 553).

All such questions lie outside the sphere of Anglo-Muhammadan Law altogether, because suits to enforce the trusts of an endowment instituted by a non-Muhammadan are not "suits in which the parties are Muhammadans within the meaning of the Civil Courts Acts.

It must have been by sheer inadvertence that the remark fell incidentally from the Court, and unfortunately found its way into the headnote of *Muzhurool Huq*, 13 W. R., 235 (1869), that "the object which all Moslems have in view in endowing lands is to support a mosque and to defray the expenses of worship." The same judge declared in a subsequent case that relief of the poor was the primary object of every endowment.*

[2] In the English leading case, *Morice* v. *The Bishop of Durham*, 10 Ves, 539, it was held by Lord Eldon that a bequest for "such objects of benevolence or liberality as the executor should most approve of" was too vague to be enforced. And on the principle of that decision the Privy Council recently supported the High Court of Bombay in declining to enforce a Hindu bequest, which directed the trustees "to act in such manner as they think proper for preserving my name, so that my money might always be used for some good *dharam* (religious or charitable purpose) after my death, and by which good might be done to me (in a future state?);" *Runchordas*, 23 Bom., 735 (1899). The assertion in Ameer Ali's Mahomedan Law, Vol. I, p. 325, that the principle laid down in *Morice* v. *The Bishop of Durham* is not applicable to trusts or consecrations under that law, seems to be founded on a misapprehension of the principle, which when rightly understood, is seen to be involved in the very nature of civil jurisdiction. To construe a trust "for good purposes unspecified" as exempting the trustee from all judicial control would be in effect to construe it as no trust at all, but a beneficial bequest to him personally; on the other hand, to construe it, with the learned author, as empowering "the Hakim" to frame a scheme at his own discretion, is to confer upon the officer so designated a function which is not judicial but administrative: it is to make the so-called *wakf* in effect a bequest to the State—only that the State is to estimate the goodness of different purposes by a Muhammadan standard. If this is really Muhammadan Law, it is outside the province for that law in British India.

Private settlements by way of *Wakf*, how far valid, if created prior to 7th March, 1913.

323. By the law applicable to *wakfs* created before the 7th March, 1913,† the date of the passing of the Mussalman *Wakf* Validating Act, VI of 1913, an endowment is not vitiated by the fact of its containing provisions in favour of individuals named, even including the founder himself, or of a series of unborn individuals, as for instance the descendants of the founder, provided that the primary object appears to be the permanent application of the property to some public and unfailing purpose.[1] But if the main purpose of the settlement be the aggrandisement of a private family, and

* This remark also is manifestly untrue if taken literally, and would not even hold good of the particular case which the learned judge had then before him. It was, however, defended by Ameer Ali, J., in *Bikani Mia*, 20 Cal. at p. 157, as "correct in one sense," namely, as meaning that "in every *wakf*, the benefaction of which is bestowed upon any individual or upon one's descendants, the charity is continued, upon their extinction expressly or by implication of law, to the general poor."

† For the law applicable to *wakfs* created since that date, *see* s. 323-B below and Appendix.

if there be either no endowment of a public nature,[2] or an endowment comparatively insignificant in amount,[3] or made to take effect only in a very remote contingency,[4] then that part at least of the deed which is of a private nature is held in British India to be invalid[5] [and *perhaps* the ultimate public trust will take effect immediately.][6]

Illustrations.

(*a*) Property is dedicated to the purpose of supporting a mosque, feeding travellers, and educating poor students, and it is provided that the remaining profits are to go towards defraying the expenses of the marriages, burials, and circumcisions of the members of the family of the person named as the first manager of the endowment. This is a valid *wakf*.

(*b*) A Muhammadan declares by deed that he makes a *wakf* of his property in favour of his two wives, of his daughters by those wives, and of their respective descendants, saying nothing as to the ultimate disposal of the property on total failure of those descendants. This *wakf* is altogether invalid.

(*c*) A Muhammadan executes a deed purporting to dedicate all his property "in the way of God as an appropriation" (fisabilillah *wakf*), for certain specified religious and charitable purposes, "in the manner mentioned below," and then proceeds to make minute provision for the succession of his sons and other descendants to the office of *mutawalli*, and for the maintenance of all the other members of the family, with power for the *mutawallis* to increase the allowances to the latter, and their own salaries, so long as the stated religious works are performed according to custom. The deed contains no explicit direction as to the application of the surplus income, over and above what will be required for the stated religious works, in the event of a total failure of the founder's descendants. This is not a valid *wakf*, for want of any ultimate dedication of the whole property to charitable uses, the stated religious works not being likely to absorb more of the income than a devout and wealthy Muhammadan would naturally spend in that way.

(*d*) Two brothers make a settlement of all their immovable properties in the following terms :—

"For perpetuating the names of our father and forefathers and for protecting our properties, we, leaving ourselves to the mercy and kindness of God and relying upon the bounty of Providence . . . make this permanent endowment (*wakf*) of all our shares and rights in the immovable properties . . . for the benefit of our sons and children and the members of our family from generation to generation, and in their absence for the benefit of the poor and beggars and widows and orphans. We two brothers take upon ourselves the management and supervision of the same in the capacity of *mutawalis* for such time as we may live, and as *mutawalis* we enjoy all rights and interest in the *wakf* properties." Other clauses gave to the first *mutawalis* and to their successors very extensive powers of management, leasing, exchange, etc., and in one place it was stated that "the principal object of this *wakf* is that there be no loss to the properties, and that the name and the prestige of the family be maintained, and that the profits of these properties be appropriated towards the maintenance of the name of the family and the support of the persons for whose benefit the *wakf* is made."

Here the ultimate trust for the poor is too remote and too manifestly subordinated to the purposes of a family entail to confer validity upon the latter, and to prevent the alienation of the property.

(*e*) Provisions in the nature of a perpetual entail are followed by this sentence :— "May God forbid it ! If from among my heirs and descendants there shall be left no one surviving, then, as regards the income of the whole of the property endowed for religious and charitable purposes, the same, for the sake of God, is duly to be distributed and given to Muhammadan fakirs and indigent people."

This entail was upheld in Bombay on the strength of the concluding clause; but the case is identical in principle with the preceding illustration, and would now be governed by the Privy Council decision which that illustration represents.

(*f*) The *wakfnama* is similar to those in the last two illustrations, but the question arises between the settlor seeking to set it aside and to regain as a childless widow the absolute power of disposition which she had renounced in favour of expected issue when about to marry, and the Advocate-General seeking to enforce against her the ultimate charitable trust. According to the law as laid down in Bombay, this part of the *wakf*

is valid and irrevocable as against the settlor, and this ruling has not so far been either affirmed or overruled by the Privy Council.

[1] See illustration (*a*), representing the case of *Muzhurool Huq*, 13 W. R., 235 (1869), approved by the Privy Council in *Mahomed Ahsanulla*, 17 Cal., 498 (1889), so far as it purported to decide that "the mere charge upon the profits of the estate of certain items *which must in the course of time necessarily cease, being confined to one family*, and which, after they lapse, will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan Law."

The case of *Muzhurool Huq* was expressly followed by the Allahabad High Court in *Deoki Prasad* v. *Inait-ullah*, 14 All., 375 (1892). In that case "the object of the *wakfnama* was, firstly, to provide for the support of the descendants and kindred of the grantor *who might be in great need of support*, and the surplus of the income of the property was to go to purposes which were undoubtedly religious purposes."

[2] This is illustration (*b*), representing *Nizamuddin* v. *Abdul Gafur*, 13 Bom., 264 (1888), affirmed by the P. C. on appeal, *A. G.* v. *N.*, 17 Bom., 1 (1892). The same conclusion had been arrived at fifteen years before in *Abdul Ganne Kasam*, 10 Bom. H. C., (1873), and had not been in any way disturbed, but, on the contrary, expressly approved, in the intermediate case of *Fatma Bibi*, cited below. See also *Murtazai* v. *Jumna*, 13 All., 261 (1890), a Shia case, in which however, no Shia authority was referred to.

[3] *Mahomed Ahsanulla*, 17 Cal., 498 (1889), summarised in illustration (*c*).

The judgment in this case expressly left open the points involved in the next two illustrations.

"Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India. On the one hand, their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with and adopt the views of the Calcutta High Court stated by Mr. Justice Kemp in one of the cited cases, *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (quoting the passage extracted above). On the other hand, they have not been referred to, nor can they find, any authority showing that, according to Muhammadan Law, a gift is good as a *wakf*, unless there is a substantial dedication of the property to charitable uses *at some period of time or other*."

A very considerable amount of authority of the kind demanded was subsequently brought to the notice both of the Calcutta judges and of the Privy Council, but it was not allowed to prevail against the combined weight of authority and policy on the other side.

As to where the line should be drawn between a substantial and an illusory dedication to charitable or religious purposes, compare *Phul Chand*, 19 All., 211 (1896), with *Mujib-un-nissa*, 23 All., 233 (1900). In the former case, reading the deed by the light of local custom, it appeared that about Rs. 500 per annum would be applied to such purposes, out of an average income of Rs. 850, and this was considered sufficient; in the latter case the amount of religious and charitable expenditure was left entirely to the discretion of the *mutaualli*, and was clearly subordinated to the main purpose of family endowment.

The old law, however, has been much more liberally interpreted recently, as in *Mutu Ramanadan Chettiar's* case cited at the end of note to below.

[4] See illustration (*d*), which represents *Abul Fata* v. *Rasamaya*, 22 Cal., 619 (1894); affirming on appeal *Rasamaya* v. *Abul Fata*, 18 Cal., 399 (1890), and thereby overruling an intermediate decision, or *dictum*, of Ameer Ali and O'Kinealy, JJ., in *Meer Mahomed Israil*, 19 Cal., 412 (1892), and following an intermediate decision of the Calcutta High Court in *Bikani Mia*, 20 Cal., 116 (1892). The last-mentioned decision had been that of three judges out of five, Ameer Ali J., dissenting, and Petheram, C. J., considering that the precise point left open by the P. C. decision in *Mahomed Ahsanulla Chowdhry* did not arise.

While thus confirming what had been the prevailing current of opinion in Bengal the Privy Council were at the same time overruling what had been till then the established doctrine on the other side of India; see the next note.

[5] In *Amrutlal Kalidas* v. *Shaik Hussain*, 11 Bom., 493 (1887), representing illustration (*e*), Farran, J., said that the settlement in question "created a perpetuity of the worst kind," and but for the authority of Baillie, which he took to be that of the Fatawa Alamgiri, he should have followed the Hedaya in holding it to be invalid; but as it was, he "felt himself at liberty to follow the decision of West, J., in *Fatma Bibi* v. The *Advocate-General*, 6 Bom., 42 (1881) and to hold the instrument to be valid as a *wakfnama*."

In the last-mentioned case, West, J. (now Sir Raymond West), had expressed the opinion (p. 53) that "if the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a *wakf* is not made invalid by an intermediate settlement on the founder's children and their descendants," and this opinion was treated as a decision by Farran, J., in the case above cited; but it was, strictly speaking, extra-judicial, because the ultimate trust for charitable and religious purposes might be enforceable though the intermediate private entail were set aside. This was pointed out by the P. C. in *Mahamed Ahsanulla*, 17 Cal. at p. 510, and in *Abul Fata* v. *Rasamaya* they disposed of both these Bombay cases by saying that the opinion expressed in the first was a mere *dictum* and that Farran, J., only decided the second as he did, contrary to his personal opinion, because he erroneously supposed himself to be bound by the authority of the first. [It is perhaps worth mentioning that he had argued as counsel in *Fatma Bibi's* case against the view which he subsequently maintained as judge.]

[6] *Fatma Bibi*, representing illustration (*f*). The point really decided in that case was merely that an endowment for a public and unfailing purpose which would otherwise be valid is not invalidated by the fact that the deed purports to postpone it to other trusts of a private nature which may not be enforceable. It would seem that the decision ought to be the same, one way or the other, whether the intermediate family-trusts failed naturally by extinction of the family, or by being set aside as illegal; but as a matter of fact no one appeared for "the poor, and beggars, and widows, and orphans of Sylhet" in *Abul Fata* v. *Rasamaya*, nor for the corresponding ultimate beneficiaries in any of the other cases. It is submitted, however, that whenever the Court finds, as had been found in that case, that "the poor had been put into the settlement merely to give it a colour of piety, and so to legalise arrangements meant to serve for the aggrandisement of a family," there is no more reason for enforcing the trust in their favour as against the heirs, creditors, or alienees of the settlor, than for enforcing it as against the settlor himself.

The P. C. ruling in *Abul Fata* v. *Rasamaya* was followed as a matter of course, without any further examination of authorities, in *Muhammad Munawar Ali*, 21 All., 329 (1899). The deed in question was executed in 1881, and reads almost as though it had been framed for the express purpose of challenging in the most direct manner the judgment which had been delivered a few weeks earlier

in the same year in the adjoining province by the High Court at Calcutta in *Mahomed Hamidulla* v. *Lotful Huq*, 6 Cal., 744 (1881). The settlors (husband and wife) frankly announce as their main object, " in order to secure the love of each individual among friends in this world, and to earn merit in the next world, to preserve the principal wealth of the estate from all manner of partition, division, transfer, and succession, and that the management thereof in whole and in part should remain for ever in the hands of one person, *whereby our name and memory and the pomp and dignity of the estate may continue.*" Then follows a recital that " the attainment of the above object is impossible except by a *wakf* as directed by the Muhammadan Law ;" and then the operative part of the deed " makes *wakf* of " certain immovable property, belonging partly to the husband and partly to the wife, " in favour of our respective selves, and after the death of one of us in favour of the surviving executant alone, and thereafter in favour of our descendants, generation after generation, so long as they exist, and in favour of the servants and dependents of the estate, and in favour of the poor, the beggars, and the needy for ever." Another clause provides that they shall remain in possession during their joint lives, " simply as persons in whose favour a *wakf* or endowment is made, and shall appropriate in every way the income and profits thereof," the husband having the entire management as *mutawalli*. His successor in that office is always to be a lineal decendant of the wife, and has a very wide discretion as to distribution of the income among the other descendants in the form of annuities, after devoting a small portion to specified religious purposes. Naturally such a settlement was not challenged until after the death of the male settlor, which happened in 1895, by which time the Privy Council decisions above mentioned had rendered its doom certain so soon as it became worth any one's while to attack it.

In the following year the P. C. had to deal with a deed similar in substance to that in *Mahomed Ahsanulla* (illustration (*c*)), but with the peculiarity that the settlor expressly described it as " a deed of family endowment," and at the same time as intended to establish " a perpetual, lasting, and continuing charity " for the benefit of his soul. After restating the doctrine of their predecessors that the deed is a vaild *wakf* if its effect is to give the property in substance to charitable uses, but not if its effect is to give the property in substance to the settlor's family, their Lordships found that the donor's liberality to religious and charitable purposes (in the English sense of these terms) was to be kept up only to an uncertain and discretionary amount, and as an incident of the family endowment, and, " indeed, (they proceeded to observe) the theory of the deed seems to be *that the creation of a family endowment is of itself a religious and meritorious act and that the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate is a charitable purpose.* It is superfluous at the present day to say that this is not the law ;" *Mujib-un-nissa*, 23 All., 233 (1900). To the same effect is *Muhammad Manawar Ali*, 27 All., 320 (1905). In *Mutu Ramanadan Chettiar* (1916), L. R., 44 Ind. App., 21 ; s.c., 40 Mad., 116 (1916), the Privy Council laid down that in determining whether a deed of *wakf* made prior to the passing of Act VI of 1913, gives the property in substance to charitable uses, so as to constitute a valid *wakf*, all the circumstances should be taken into consideration, such as the donor's financial position, the amount of the property, the nature and needs of the charity, its probable or possible expansion, and the priority given to the claims of charity a trust in which an indeterminate portion of the income was left for pious and charitable purposes, remuneration was provided for the donor's sons as trustees, and the residue was left in perputuity for the benefit of the donor's heirs without power of alienation, was held a valid *wakf*. This shows a considerable advance of judicial opinion from the position taken up in *Mahomed Ahsanullah* (illustration (*c*)) ; see also note to sec. 323A. This judicially interpreted law now applies only to *wakfs* created before March 7th, 1913, since that date, family *wakfs* have been expressly declared valid by legislation, under certain qualifications set out in the Mussal-

man *Wakf* Validating Act, 1913, for which and notes thereon, See appendix B. below, also sec. 323B.

Perpetual obsequies, &c., whether proper objects of *wakf*.

323A. According to a Madras decision, the perpetual maintenance of the tomb of a private individual (as distinguished from that of a recognised saint), and the perpetual performance of ceremonies in his honour, or for the benefit of his soul, are not religious or charitable objects within the meaning of the Muhammadan law of *wakf*, so as to take them out of the operation of the general rule of the territorial law against perpetuities.[1]

The performance of *fàtehas* (*i.e.* distribution of alms accompanied by prayers for the souls of deceased persons) has been held both at Madras and at Allahabad to be a valid object of *wakf*, if the only expenditure of money contemplated is for feeding the poor.[2]

Dedication of a house to the service of the Imam Hasan and Husain and for other religious purposes constitutes a valid *wakf*.[3]

[1] *Kaleloola*, 18 Mad., 201 (1894). It was proved that there were ancient texts condemning all such practices, even the building of substantial tombs, while against the validity of endowments for Koran readings at a tomb there was a clear passage of the Fatawa Alamgiri; Baillie, 576, 567 (in the edition of 1865); and there *was said to be a* decision of the Sudder Court to the same effect (*Khodabundha Khan* v. *Oomutul Fatima*, S. D. A. (1857), 235.* On the other hand, it was admitted that all these practices were more or less sanctioned by modern custom, especially in India. The judge of first instance seems to have thought that it would be absurd for an Indian Court to pronounce a general Muhammadan practice contrary to Muhammadan Law; but the Court of Appeal pointed out that a custom of performing such ceremonies was by no means the same thing as a custom of providing for them by means of endowments; and that when *wakfnamas* for such purposes had been upheld, as, for instance, in *Delroos Banu Begum*, 15 B. L. R., 167 (1875), the dedication had had relation to the tombs of saints only, and had been intermixed with charitable purposes either for the poor or for the settlor's own kindred. And they concluded as follows:—

"In the absence of any express authority showing that a dedication for ceremonies at a private tomb—and for that purpose only—is valid under Muhammadan Law, we do not think we ought to uphold the deed. It creates a perpetuity of the most useless description, which would certainly be invalid under English Law. The observance of these ceremonies may be considered by the Muhammadans as a pious duty, but it is certainly not one which seems to fall within any definition of a charitable duty or use. These observances can lead to no public advantage, even if they can solace the family of the lady herself. The case bears a close analogy to one in which a Roman Catholic has devised

* As there reported, the case appears to establish nothing of the kind, and is, moreover, a Shia case, but the judges seem to have derived their conception of its effect from a brief and inaccurate note contained in the Appendix to the third (Madras) edition of Macnaghten's Moohummudan Law.

property for masses for the dead, which has been held to be invalid in India on grounds of public policy irrespective of any territorial law; *Colgan* v. *The Administrator-General of Madras*, 15 Mad., 424, 446 (1892). A similar bequest in a Chinese will has also been held to be invalid in an appeal to the Privy Council from the Supreme Court of the Straits Settlements; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. ,6 P. C., 381 (1875). Had it been shown that such perpetuities were recognised as valid under Muhammadan Law, we should have felt constrained to uphold the deed; but in the absence of such proof we think the general rule of public policy ought to prevail."

It is remarkable that the judges adverted to *Meer Mahomed Israil Khan*, 19 Cal., 412 (1892), without expressing dissent from the principle there laid down of the validity of a *wakfnamah* in favour of descendants, from which seems but a short step to the validity of an endowment for solacing the feelings of the settlor and her descendants. They might have expressed themselves still more confidently on the case before them could they have foreseen that the former principle also would be condemned by the Privy Council about three weeks later.

In *Ramanadhan Chettiar*, 34 Mad., 12 (1910), confirmed on appeal by the Privy Council, 40 Mad. 116 (1916), there was a direction for the distribution of money, food and clothes to the poor and the performance of *fateha* on three days of ancestors, estimated to cost about Rs. 330 to Rs. 360 per annum; salary trustees, about Rs. 240; and the payment of the residue estimated at Rs. 900, for the support in perpetuity of the grantor's family. Their Lordships held that it was a good *wakf*, as the main and paramount object was charities; and although the sums devoted to these objects were not large, they tended constantly to increase, and they were the first burden upon the property up to the limit of the trust-funds, while the residue which was given to the family was a dwindling sum.

[2] *Ramanadhan Chettiar*, as above; *Mazhar Husain*, 33 All., 400 (1911). In the latter case, Stanley, C. J., was inclined to doubt whether such *wakfs* were in accordance with the principles of Muhammadan Law, but having regard to the rulings referred to in the judgment of his colleague, Banerji, J., and particularly to *Bibi Jan* v. *Kalb Husain*, 31 All., 136 (1908), he did not feel justified in recording a dissentient judgment. In *Salebhai Abdul Kader*, 36 Bom., 111 (1911), the charitable or religious objects mentioned in the deed were: the performance of the *Gadi-ul-Kham* feast at Mecca and in Surat, and a *fatiha* dinner on his and the testator's account. Beaman, J., accepted the first as valid, but the second as doubtful, quoting this very section of this work. It is submitted respectfully that what is called "Fattiah dinner" in Bombay phraseology *is* the perfomance of *Fatiha*, which involves charitable meals or gifts, and has been held to be a valid object of *wakf* by the Allahabad and Madras High Courts. Beaman, J. further held that, where the testator has indicated a general charitable intention in the bequest, if it fails wholly or partially, the *cy press* doctrine can be applied and the property can be devoted to religious or charitable purposes.

[3] *Ram Charan Law*, 42 Cal., 933 (1915); apparently a Shia case.

323B. After the 7th March 1913, it is lawful for any Muhammadan to create a *wakf*, which in all other respects is in accordance with Muhammadan Law, for the following among other purposes:—

(*a*) for the maintenance and support, wholly or partially, of his family, children, or descendants; and

Family *wakfs*.

Wakfs for personal support.

(*b*) where the dedicator is a Hanafi, also for his own maintenance and support during his life-time or for the payment of his debts out of the rents and profits of the property dedicated :

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by Muhammadan Law as a religious, pious, or charitable purpose of a permanent character.

Doctrine of "remoteness" not to apply.

No such *wakf* shall be invalid merely because the benefit reserved for the poor, or other religious, pious or charitable purpose of a permanent nature is postponed till after the extinction of the family children, or descendants.

This follows closely the wording of secs. 2 and 3 of the Mussalman *wakf* Validating Act, VI of 1913, for the full text of which see Appendix B. The Act does not apply to *wakfs* created before the date on which it was passed, 7th March, 1913; *Amirbibi*, 39 Bom., 563 (1914) and *Ramanandan*, 40 Mad., 116 P. C. (1916), nor to a *wakf* already declared invalid in a former adjudication. *Mahomed Buksh*, 43 Cal., 158 (1915). The doctrines of (*a*) substantial dedication to charitable purposes and (*b*) invalidity for remoteness of benefit to the poor, as expounded in *Abul Fata*, 22 Cal., 619 1894) and followed in other cases, is no longer law for *wakfs* created since the Act.

Succession per stirpes.

324. When a person makes an endowment containing provisions in favour of his own or any other person's descendants, without defining the order of succession among them, these provisions being sufficiently subordinated to a primary public object to satisfy s. 233, the succession is to be *per stirpes*, and not *per capita*, contrary to the ordinary Muhammadan law of inheritance.

Illustrations.

(*a*) "A person made an appropriation of a village, on the condition that the profits should be enjoyed by Zeyd and his offspring, generation after generation; in this case each branch of lineal descendants will share alike, whether consisting of one individual or of many persons; and the profits will be enjoyed by the descendants in this manner until the lineage becomes extinct [the nearer descendants continuing to exclude the more distant whose ancestors are alive, and on the death of one ancestor leaving a family, his family succeeding to the portion enjoyed by him. Where one of the sharers dies childless, his portion goes to increase the joint stock, and when the whole lineage becomes extinct the appropriation should be devoted to the benefit of the poor."

(*b*) "A person makes an appropriation in favour of his lineal* descendants, who are ten in number; so long as those remain alive they will each be entitled to an equal share. But if four of them die childless, and two die leaving children, and a dispute arise between the four survivors and the children of two of the deceased sharers, the

* *Sic* in Macnaghten; but the context seems to show that they all belong to the first, or at any rate to the same, generation of descendants.

profits of the appropriation should be made into six portions, of which the former are entitled to four, and the latter to two."

Macn. 341, Case viii, Q. 2, of the Precedents of Endowment. The illustrations are those cited by the law-officers in support of their opinion in the case; the first from the *Khizanat-ool-Mooftieen;* the second from the Fatawa Alamgiri. It is curious that no such passage occurs in Baillie's Digest, which is understood to be based on the Fatawa Alamgiri, nor is the rule itself anywhere distinctly laid down by Mr. Baillie. It was referred to as established law in *Sayad Mahomet Ali*, 6 Bom., 88 (1881), though it was held inapplicable to the grant there in question, which the Court held, in accordance with the rule laid down in s. 323, not to be a *wakf* at all, but an ordinary grant to an individual transmissible to his heirs under the general Muhammadan Law. The *sanad* was a very ancient royal one, whereby certain land was "settled and conferred" on one Sayad Hasan, "as a help for the means of subsistence for the children of the above-mentioned S. H., *without restriction as to names*, in order that using the income thereof from season to season and from year to year for their own maintenance, they may engage themselves in praying for the perpetuity of this ever-enduring Government." The words italicised, to which the Court was unable to attach any precise meaning, certainly seem intended to prescribe some mode of succession different from the ordinary law; but on the modern judicial theory of the necessity for express mention of a public and unfailing purpose, the mere duty of praying for a long extinct Government was naturally held insufficient to constitute *wakf*.

While Baillie's Digest contains nothing about the rule of distribution *per stirpes*, it does contain passages which would limit the application of the words enclosed in brackets in illustration (*a*) to the particular case in which the expression "generation after generation" has been employed. If the settlement is on "progeny" (*nusl*), it is expressly said that the near and remote share alike, and it is the same where it is "on my children (*aulad*)," after the exhaustion of the first two generations. See Baillie, pp. 571-573.

The same section of Baillie's Digest contains various other rules relating to the interpretation of particular forms of settlements on descendants, which it seems hardly worthwhile to reproduce, considering how narrowly the possibility of such settlements is now restricted.

325. Under an endowment or settlement of the kind mentioned in the preceding section, the ordinary rule of the double share to the male has no application, and daughters share equally with sons, unless it be otherwise provided in the deed.

Daughters share equally with sons.

Macn. p. 342; Baillie, 570. For the rule of the double share to the male, see s. 225, *ante*.

326. Though the daughters themselves are included under such general terms as "child" or "children," their children and remoter descendants are not admitted to share with descendants in the male line, unless some special term clearly indicating such an intention is employed.

Children of daughters not reckoned as descendants.

Baillie, 570-572. The Arabic plural *aulad*, and its Persian equivalent *farzandan*, are understood to include both sons and daughters, and all descendants in the male line, h.l.s., but not descendants in the female line; *Hya-on-Nisa*, 1 S. D. A., 106 (1805).

In *Shekh Karimodin*, 10 Bom., 119 (1889), the claim of a male, tracing descent from the original beneficiary through four males and two females, was allowed, the expression used in the grant being *aulad va ahfad;* but it was said that it would not have been allowed had the expression been *aulad dar aulad.*

SUPERINTENDENCE OF ENDOWMENTS.

The *Mutawalli.*

327. An endowment involves the vesting of the legal ownership (or quasi-ownership) of the property in one or more trustees (*mutawallis*) who are ordinarily nominated by the founder. It is not illegal for the founder to constitute himself *mutawalli*,* but this intention will not be inferred from his silence. If no *mutawalli* is appointed the better opinion seems to be that the endowment fails altogether, unless it be a dedication to some public use and the public have actually used the property accordingly.

Baillie, 591. "Moohummud, the son of Alfuzl, being asked respecting one who had made it a condition in constituting a *wakf* that the governance of it should be for himself and children, answered, 'It is lawful, according to all.' A man makes a *wakf* without mentioning any one for its governance—it has been said that the gevernance is for the appropriator himself; and this is agreeable to the opinion of Abu Yusuf, for with him, delivery was not a necessary condition, but according to Moohummud, the *wakf* is not valid; *and so it is decided.*" In confirming the latter opinion, the Muhammadan lawyers are not, as might seem at first sight, contradicting the maxim of English Equity that a trust shall never fail for want of a trustee, for that only applies to a trust created by will, or to a subsequent vacancy in a trust once validly created by deed. Even in England a non-testamentary trust-deed must either take the form of a conveyance to a person or persons named upon certain trusts, or of a declaration by the settlor that he henceforth holds the property upon certain trusts. Whether Muhammad's opinion, connected as it is with his view as to the necessity for delivery to complete a *wakf inter vivos*, is meant to apply also to a testamentary *wakf*, is not quite clear. At all events, the appointment of a person as executor to a will which included a *wakf* would probably be taken to imply authority for him to appoint a *mutawalli.*

In this, as in most other cases, Ameer Ali considers that the opinion of Abu Yusuf ought to be followed (M. L. Vol. I, 222); he cites the Fath ul Kadir on his side, but takes no notice of the equally decided pronouncement of the Fatawa Alamgiri on the other side. According to Ameer Ali himself (I, 176) the compiler of the F.A. had the Fath ul Kadir (a fifteenth-century commentary on the Hedaya) before him, and frequently quotes it; so that his rejection of its authority on this occasion was presumably deliberate.

The employment here of the terms "legal ownership" and "trustee" is a concession to English legal ideas and to the necessities of Anglo-Indian

* Called in Modern Egypt, "Nazir."

procedure, which does not admit of a suit relating to property without some person, natural or artificial being regarded, at least provisionally, as the legal owner thereof. According to the Muhammadan (Hanafi) definition of *wakf*, the ownership is extinguished altogether, or is vested in The Almighty, and the *mutawalli* is, as the name implies, a mere manager on His behalf. It is expressly stated (Baillie, 551) that when it passes out of the owner it does not pass to the beneficiaries.*

The Maliki view as to the legal ownership in cases of *wakf* is different. See last para. of note 1 to sec. 317 above.

As to the dedication of a mosque, burying ground, etc., see under s. 320. It being clear that in these cases public user may take the place of delivery to a *mutawalli*, and it having been even a matter of debate (Hed. 240) whether such delivery would be effective for the purpose, because according to one (not the approved) view there is no business connected with a mosque requiring a superintendent, it may be inferred that a *wakf* of this description will not fail merely for non-appointment of a superintendent.

328. The mode of succession to the office of *mutawalli* is usually defined in the deed of endowment. If it has not been so defined, and if the intention of the founder cannot be inferred from usage, the right of appointing a successor when a vacancy occurs vests in— Succession to the office.

(1) The founder, if still living;

(2) His executor, if any; then, except as provided by the next section, in

(3) The Court (other than a Small Cause Court) which exercises ordinary civil jurisdiction over the local area within which the dedicated property is situated.

But the Court should select by preference a member of the founder's family, if there be any fit person possessing that qualification.

Baillie, p. 593. "When the superintendent has died, and the appropriator is still alive, the appointment of another belongs to him and not to the judge (1); and if the appropriator be dead, his executor is preferred to the judge (2). But if he had died without naming an executor, the appointment of an administrator is with the judge (3). In the *Asul* it is stated that the judge cannot appoint a stranger to the office of administrator so long as there are any of the house of the appropriator fit for the office; and if he should not find a fit person among them, and should nominate a stranger, but should subsequently find one who is qualified, he ought to transfer the appointment to him. When the appropriator has made it a condition that the superintendent shall be of his children and children's children, and the judge appoints another than one of these without any malversation, is the person so appointed the superintendent? Boorhan-ood-Deen has said 'No.'"

* It is otherwise by Shia Law, s. 483. In Algeria it seems to be the almost universal practice to dispense with the *mutawali*, the property being jointly managed by the beneficiaries: Clavel, *Wakf ou habous*, vol. ii., p. 5.

In *Advocate-General* v. *Fatima Sultani Bagum*, 9 Bom. H. C., 19 (1872, a Shia case), the widow of the founder, being his sole surviving executor, was held entitled to appoint a *mutawalli* subject to the approval of the Court.

Among the numerous kinds of suits which Small Cause Courts are prohibited from entertaining, are suits relating to immovable property, and suits relating to trusts. See the Second Schedule to the Provincial Small Cause Courts Act, 1887, clauses (4), (11), (18), and the Presidency Small Cause Courts Act, 1882, clauses (*d*), (*g*), (*k*).

But there is no authority for denying this jurisdiction to any other kind of Civil Court, apart from the pecuniary limits imposed by the several Civil Courts Acts. In *Nimai Chand Addya*, 37 Cal., 179 (1909), at p. 187, Pugh, J., said that he could see no reason why an approval by a subordinate judge of a transaction by which *wakf* property is mortgaged, provided he has jurisdiction over the *wakf* property, should not be quite as effectual as a sanction by a district judge.

The right to succeed to the *tauliat* (trusteeship) of *wakf* property, being a public right, is not a right which can be settled by reference to arbitration, *Muhammad Ibrahim Khan*, 32 All., 503 (1910).

As to the procedure for setting the Courts in motion, see ss. 342-346.

328A. If the *mutawalli* indicated in the deed of endowment to succeed to the office on the death of the first or other *mutawalli*, be a minor at such death, the district judge is competent to appoint a person to perform the duties of the office, under the Guardians and Wards Act (VIII of 1890), pending either the coming of age of the minor or the institution of a regular suit by some persons interested in the endowment. (see secs. 342 and 343 below).

Ejath Ahmad, 39 All., 288 (1916). The *wakf* was of a partly public and partly private character, and though the property the subject of the *wakf* was not private property, the minor had an interest in it which could be protected by a properly appointed guardian.

In the Madras case *Raza* v. *Ali*, 40 Mad., 941 (1917), there was a seheme for a mosque framed by the High Court, under which "competent men" could be appointed as *mutawallis* by a Committee: the appointment of a minor as *mutawalli* was held to be void *ab initio*, even if the question arose after he attained his majority.

The office may sometimes be transmitted by will.

329. After the death of the founder, and of his executor, if any, and if no order of succession has been indicated in the deed of endowment, the *mutawalli*, for the time being may appoint his own successor by will. But an order of the Court is necessary in order to complete the title of the testamentary successor to the emoluments enjoyed by his predecessor.[1]

A *mutawalli*, has no power to transfer the office to another person while he is himself alive and in good health, unless such a power was expressly conferred upon him by the founder or by the Court that appointed him.[2]

But is never transferable *inter vivos*.

[1] Baillie, 594. "A superintendent may, at death, commit his office to another, in the same way as an executor may commit his to another. But when the appropriator has assigned some particular property for this superintendent, it does not belong to the person whom he has appointed to the office, and the matter must be submitted to the judge, in order that he may assign for him the hire or salary of similar work, unless the appropriator had ordered the allowance for every superintendent."

[2] *Khajeh Salimullah*, 37 Cal., 263 (1909). Various extracts from Muhammadan law-books, previously untranslated, were considered in this case, but the decision was based mainly on the sentence in Baillie's Digest, which follows immediately on the extract last quoted: "A superintendent, while alive and in good health, cannot lawfully appoint another to act for him, *unless the appointment of himself were in the nature of a general trust.*" For explanation of the words italicised the Court had recourse to a passage quoted by Mr. Ameer Ali (M. L. Vol. I, p. 360) from the Radd ul Muhtar: "The term 'general' means that if the *wakif*, or Kazi, make a condition, at the time of appointing the *mutawalli*, that he should have the power of transferring the trust to another, and substituting that other in his own place, by a *sanad-i-wakf* or *wasiat*, should necessity arise for it, such a condition would carry with it the power, on the part of the *mutawalli*, to appoint another *mutawalli* during his lifetime or in death-illness."

That an office to which are attached essentially the conduct of religious worship and the performance of religious duties is not legally saleable had been laid down in several Hindu cases, on grounds of public policy, before it was affirmed in the Muhammadan case of *Sarkum Abu Torab*, 24 Cal., 91 (1896).

330. A custom that the office of *mutawalli* should devolve from eldest son to eldest son, or by any other rule of inheritance, is opposed to the general Muhammadan Law, and must be supported by strict proof.[1] But where such usage is proved, it should be followed.[2]

Not hereditary, unless by special custom.

[1] *Sayad Abdula Edrus*, 13 Bom., 555 (1888), referring to Macn. p. 343, and other authorities. This principle was also followed in Madras: *Phatmabi*, 38 Mad., 491 (1915): where there has been a long established practice for the *mutawalli* to nominate his successor, it is assumed, unless the contrary is proved that the power was given by the founder.

[2] The right of management of religious institutions should be decided according to the prevailing usage, that usage being taken as an indication of the directions of the founder. *Ismailmiya*, 36 Bom., 308 (1911).

331. A female may be the *mutawalli* of an endowment,[1] and so may a non-Muhammadan[2]; but if the endowment be for the purpose of divine worship, neither females nor non-Muhammadans are competent to hold the office of *sajjadanashin*, or spiritual superior.[3]

Females and infidels may be *mutawallis*.

[1] 1 Morl. 554, citing *Hyatee Khanum*, 1 S. D. A., 214 (1807) and *Doe dem Jaun Bebee and others* v. *Abdollah Barber* (1838), 1 Fulton, 345; *Wahid Ali*, 8 Cal., 732 (1882); *Khajeh Salimullah*, 37 Cal., 263 (1909); *Munnavaru Begam Sahibu*, 41 Mad., 1033 (1918). In the last case a woman was held competent for the office of Head Mujavar of an Astan or platform on which Moharram ceremonies were performed. Though by general Muhammadan law a woman is not prohibited from holding a religious office, such prohibition way arise from local custom or usage.

[2] Ameer Ali, M. L. Vol. 1, p. 351, on the authority of the *Asaaf*. He adds, however, that the Kazi is entitled to remove such a person on the ground that from his position he is unable to discharge the duties satisfactorily. And accordingly, in *Shahoo Banoo*, 34 Cal., 118 (1906), where the Court had appointed a woman of the Babi sect to be *mutawalli* of a Shia endowment, the Appellate Court set aside the appointment, not as being illegal, but as being an indiscreet exercise of judicial discretion. and was upheld in so doing by the P. C.

Of course, if the fact of belonging to a wholly different religion will not disqualify for the office of *mutawalli*, still less will difference of sect, and accordingly, in *Doyal Chand Mullick*, 16 W. R., 110 (1871), the Court did not hesitate to appoint a Shia to be *mutawalli* of a Sunni endowment, he being a person of large local influence with Muhammadans of both sects.

[3] *Hussain Bibee*, 4 Mad. H. C., 23 (1867); *Mujavar Ibrambibi*, 3 Mad., 95 (1880); to be distinguished from the case of *Munnavaru Begam Sahibu*, 41 Mad., 1033 (1918), where it was not proved that there were any religious duties which the woman could not perform personally or by proxy. But a male may be qualified for the office of *sajjadanashin* by descent from the original grantee through a female ancestor who would herself have been disqualified by her sex; *Shekh Karimodin*, 10 Bom., 119 (1889).

M. not removable by the founder.

332. A *mutawalli* once lawfully appointed cannot be removed except by the Court; not even by the founder himself, unless the power of removal was expressly reserved in the deed of endowment.

Baillie, 591, 592, where it is said that the *futwa* (*i.e.* apparently the authoritative judicial opinion under Aurangzib) is with Muhammed as against Abu Yusuf, who considered that the founder might in any case remove his own appointee. And so it was decided in *Hidaitoonissa*, 6 N. W., 420 (1870); a Shia case, but decided with reference to the above Hanafi texts, no Shia authority to the contrary having been adduced. See also *Gulam Husain Sahib*, 4 Mad. H. C., 44 (1868).

When removable by the Court.

333. The Court may remove a *mutawalli* for manifest malversation, or on the ground of physical or mental incapacity—even if he should have been expressly declared by the founder to be irremovable.

Baillie, 598.

Macn. p. 70, Princ. End. 8. "If he (the appropriator) stipulate that the superintendent shall not be removed by the ruling authorities, such person is nevertheless removable by them on proof of incapacity." An instance of such removal on the ground of an improper alienation is supplied by the case of *Doyal Chand Mullick*, 16 W. R., 116 (1871).

334. The *mutawalli* may not, without the sanction of the Court, sell any part of the trust-property merely for the sake of improving the rest by means of the proceeds of the sale, but he may do so where the removal of the thing sold is in itself beneficial to the remainder, or where the thing removed is merely the annual growth, which will be replaced in the course of nature.

When *wakf* property may be sold.

Illustrations.

Trees in a vineyard cannot lawfully be sold when the fruit of the vines is not injured by their shade; and though it should be injured by their shade, they cannot be sold, if the fruit is more profitable than that of the vines; but if it be less profitable the trees may be cut down and sold. Trees which are not fruit-bearing may also be cut down and sold, whenever their shade is injurious to the fruit of the vineyard, but not otherwise. But trees that shoot out a second or third time may be cut down and sold, for they are like corn and fruit.

Both the text and the illustrations are taken from Baillie, p. 595.

335. A *mutawalli* should not in general grant a lease for more than three years of agricultural, or for more than one year of house, property, unless expressly authorised so to do by the terms of the endowment.[1] And if he allows the property to be occupied at no rent, or at an inadequate rent, he is liable for as much rent as is generally obtainable for similar property.[2]

Restriction as to leases.

[1] Baillie, 596, set out under s. 337, note 1.

[2] *Ib.* 597. For other authorities on both points, see Ameer Ali, Vol. I, pp. 379, 380.

336. The maintenance of *wakf* property in as good a condition as it was in at the time of the endowment is a first charge upon the income, if any, derived from the property.

Repairs a first charge on the income.

Hed. 236. An exception is subjoined which runs as follows in Hamilton's translation:—

"If, however, the appropriation be to some particular person in the first instance, and after him to the poor, the repairs are in this case due out of that person's property (but he is at liberty to furnish the means out of whatever part of his property he chooses) during his life; and in this case no part of the income is laid out in repairs, because the requisition from the person who enjoys the benefit is in this instance possible, since he is specified and known."

What is difficult to understand is, how it can make any difference to the person who is for the time being receiving the whole income of the endowment whether he pays for the repairs out of that income or out of any private property

he may happen to possess. Possibly the words appropriation to some particular person in the first instance "do not mean appropriation of the whole income of the *wakf* to that person for life, but only of part of the income, the residue being given to the poor, the rich and specific beneficiary is then responsible for the repairs. The temporary possibility, also, of the cost of repairs exceeding the income of the *wakf* (see sec. 337 (2) and (3) below) may have been held in view.

What may be done with sanction of the Court.

337. The following acts may be done with, but may not be done without, the sanction of the Court, except where the deed of endowment expressly empowers the *mutawalli* to do them.

(1) Letting the property for a longer term than one year or three years, as the case may be, even though such leases should have been expressly prohibited by the founder ;[1]

(2) Contracting debts for repairs of the property, or for payment of taxes, when there is no income available for the purpose,[2] and mortgaging the dedicated land or its produce by way of security for debts so contracted ;[3]

Selling part of the dedicated land for the purposes above mentioned ;[4]

(4) Increasing the allowances of officers and servants required for the purposes of the endowment (*e.g.* the *imam*, *khatib*, or *muezzin* of a mosque), if fit persons cannot be obtained for the salaries fixed by the founder.[5]

[1] Baillie, 596. "When the superintendent of a *wakf* has let a *mansion* appropriated for the poor for more than a year, the lease is unlawful. In the absence of any condition, the approved doctrine is that the lease of *estates in land* may be decreed to be lawful for three years, unless it be for the benefit of the *wakf* to annul them ; and that with regard to *the leases of other property*, they should be decreed to be unlawful when they exceed one year, unless it be for benefit of the *wakf* to sustain them. But this varies with the change of places and times." "If the appropriator had made it a condition that leases shall not be granted for more than a year, and people are unwilling to take them for so short a period, still the administrator has no power to grant a longer lease, but should lay the matter before the judge, that he may lease it for more than a year."

According to the Radd-ul-Muhtar as cited by Ameer Ali, p. 379, even express permission by the founder will not justify a lease for more than the customary term without the sanction of the Court. In *Dalrymple* v. *Khoondkar*, S. D. A., 1858, p. 586, a perpetual lease by a (so-called) *mutawalli* was allowed to stand ; but there the view taken by the Court (wrongly, as was held in a subsequent case) was that the fact of the office being hereditary and coupled

with a beneficial interest proved that it was not a case of *wakf* at all, but of "a heritable estate burdened with certain trusts;" and that being so, there appeared to the Court to be no sufficient reason why the incumbent should not exercise the right possessed by other proprietors to grant leases even in perpetuity. But in *Shoojat Ali*, 5 W. R. 158 (1866), this position was pronounced to be "unsupported by any authority and unsound in principle," and a lease in perpetuity at a fixed rent was declared to be void, even on the supposition that the office of *mutawalli* was hereditary.

[2] Baillie, 597. But it is reasonable to assume, with Ameer Ali, p. 374, that "this principle does not refer to such debts as, owing to the exigencies of society, must necessarily be contracted from day to day for the due discharge of the works of the trust; for example, a debt to the oilman for the oil to light the mosque, to the baker to supply bread for the students of a madrassa; all these can only be paid at periodical intervals. Such necessary debts must be paid out of the income of the *wakf*."

[3] *Moulvie Abdoollah*, 7 S. D. A., 268 (1846); *Nimai Chand Addya*, 37 Cal., 179 (1909), where the Court went rather further than this, and confirmed retrospectively a mortgage originally made (under urgent necessity) without its sanction. For the general rule the following from the Kazi Khan was relied on. "When the *mutawalli* wishes to borrow on [the security of] the *waqf*, in order to pay off the mortgage-money (literally, price of mortgage),* he is empowered to do so with the sanction of the Kazi; otherwise not." And for the validity of retrospective sanction the following from the *Durr-ul-Mukhtar*. "In such a case it [borrowing on the *waqf*] is permitted, subject to the two following conditions:—(1) the permission of the kazi, but *if the kazi happens to be at a distance*, he may borrow on his own authority; (2) when it was not possible to lease the property, and to spend the rents, &c., arising therefrom." A somewhat similar passage was also cited from the *Radd-ul-Muhtar*.

In the case before the Appellate Court no proof was offered that the Kazi (supposing him to be properly represented by the subordinate judge) was at an impracticable distance; but from the fact of this exception being mentioned, Pugh, J., rather boldly inferred that "the previous permission of the Kazi is not a condition precedent." The learned judge went on to say, "Sir Roland Wilson appears to favour this view when he suggests that the transaction may be retrospectively confirmed by the Court." My suggestion, howerer (omitted in the present edition), was made with reference to leasing, not to mortgaging. It was based on the passage in Baillie's Digest last above quoted, which does not now seem to me to bear that construction. It seems likely that if this loophole is left open the parties concerned will always be disposed to consider that the "Kazi" is at too great a distance to be conveniently applied to, and mortgages of *wakf* property will have been placed practically on the same footing as mortgages of Hindu family property, namely that the parties take the risk of being able to satisfy the Court that there was a *bonâ fide* necessity, if the transaction is challenged.

In the case now in question repayment of the mortgage-debt (with reduced interest) was ordered to be made out of the income of the *wakf* property, which for this purpose was placed in the hands of a receiver; and it was not necessary to decide whether the Court was competent to direct the sale of the mortgaged properties for the satisfaction of the debt, a point as to which the learned judge seemed to have grave doubts; but see the next note.

[4] Macn. 328, and footnote. "Sale should not be resorted to so long as any other method of realising the necessary funds may exist, and even in that case

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* *Sic* in the report: meaning, apparently, the debt for payment of which security is required.

judicial authority should be obtained." See also Baillie, 587. The application for sanction to a sale must be by regular suit, not by petition, *Halima Khatun*, 37 Cal., 870 (1910).

[5] Ameer Ali, M.L. Vol. I, p. 372, apparently from the *Radd-ul-Muhtar*.

Lapse of delegated powers.

338. All powers delegated by a *mutawalli* lapse on his death or removal.

This seems to be the principle involved in *Moheeooddeen Ahmed*, 6 W. R., 277 (1866).

Remuneration of the *mutawalli*.

339. If no provision is made in the deed of endowment for the remuneration of the *mutawalli*, the Court may in its discretion fix any allowance for him not exceeding one-tenth of the income of the endowment. But where the deed itself authorises the *mutawalli* in general terms to maintain himself out of the income, he is not chargeable with a breach of trust for exceeding this limit.

Mohiuddin v. *Sayiduddin*, 20 Cal., 810 (1893), at p. 821, *per* Tottenham and Ameer Ali, JJ. The latter in his book on Muhammadan Law, vol. i, p. 372, states the rule as follows: "In fixing the salary of the *mutawalli*, regard should be paid by the Kazi to the customary allowance at the time, but it should not exceed one-tenth of the income. Of course, the *wakif* can fix any amount, and even if it is more than one-tenth it would be valid; but if he fixes too low a sum, the Kazi has the power upon the application of the *mutawalli* to fix a proper salary. No specific reference is given to any authority, but the bulk of the chapter in which this passage occurs appears to be taken from the *Radd-ul-Muhtar*.

THE GENERAL LAW OF INDIA RELATING TO THE PROTECTION AND ADMINISTRATION OF ENDOWMENTS.

The Official Trustee.

340. (1) Any person who is about to settle property upon any trust, whether for a charitable purpose or otherwise (but not for a religious purpose), may appoint the Official Trustee, with the latter's consent, to be the trustee of such settlement.

(2) If property is subject to a trust for a non-religious purpose, charitable or otherwise, and there is no trustee willing to act or capable of acting, or all the trustees and the persons beneficially interested are desirous that the Official Trustee shall be appointed in the room of the trustees or trustee, the High Court may appoint him with his own consent.

Act XVII of 1864, secs. 8, 9, 10, summarised. See also Act V of 1902, which provides for the posts of Administrator-General and Official Trustee being held by the same person. The word "charitable" not being defined, presumably is intended to have the meaning assigned to it by the English decisions based on the Act of Elizabeth, subject only to the proviso that no trust for any religious purpose is to be held by the official trustee. See the next section.

The Treasurer of Charitable Endowments.

341. By the Charitable Endowments Act, 1890,[1] provision is made for the appointment of an officer of the Government by the name of his office to be "Treasurer of Charitable Endowments" for the territories subject to any Local Government, and where any property is held or is to be applied in trust for a "charitable purpose," the Local Government may, on application by the trustees or trustee who so hold it, or by the person or persons proposing so to apply it, vest the property in the aforsaid Treasurer on such terms as to the application of the property or the income thereof as may be agreed on between the Local Government and the person or persons making the application; but the vesting order is not to require the Treasurer to administer the property, nor to impose upon him the duty of a trustee with respect to the administration thereof.

"Charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively[2] to religious teaching or worship.

The Local Government may, with the concurrence of the persons making such application as aforesaid, settle a scheme for the administration of any property which has been, or is to be, vested in the Treasurer or Charitable Endowments, and it then becomes the duty of the Treasurer to apply the property or the income thereof in accordance with the scheme.

[1] Act VI of 1890, ss. 2, 3, 4, 5, 6, 8.

The following case was put by a member of the Legislative Council to illustrate the effect of the word "exclusively": "Diocesan schools have been established [in England], not so much to give religious instruction as to prevent general education from being wholly secularised; there is some direct religious teaching, and the work of each day is begun and ended with some act of Christian worship; but the main aim and object is to impart a sound general education, pervaded throughout with a moral and religious tone. The funds of any trust founded on a mixed basis of this character may certainly be vested in the Treasurer, and the Local Government will be competent to sanction a scheme for its management." Supposing the above exposition to be sound (of course it is

not authoritative) it would seem that the property of (*e.g.*) the Muhammadan Anglo-Oriental College at Aligarh might, if it were thought desirable, be in like manner vested in the Treasurer.

The general position of the Treasurer was thus explained: "He will have nothing to do with the administration of the charity funds; he will simply hand over the income to the persons who, under this scheme, are entrusted with its administration, but who, in their turn, are left subject to the ordinary law in regard to the malversation or misappropriation of the funds that may come to their hands."

There is no similar restriction to the meaning of "charitable" in the Societies Registration Act, XXI of 1860, and accordingly a society which had for its object the management of a mosque, and the protection of the property attached to it, was held to be duly registered under that Act, *Anjuman Islamia of Muttra*, 28 All., 384 (1906).

Procedure for enforcement of charitable or religious trusts.

342. (1)[1] In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust,[2] the Advocate-General,[3] or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction, or in any other Court empowered in that behalf by the Local Government, within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

(*a*) removing any trustee ;[4]

(*b*) appointing a new trustee ;

(*c*) vesting any property in a trustee ;[5]

(*d*) directing accounts and inquiries ;[6]

(*e*) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;

(*f*) authorising the whole or any part of the trust-property to be let, sold, mortgaged, or exchanged ;[7]

(*g*) settling a scheme ; or

(*h*) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1)

shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.[8]

[1] This is s. 92 of the Civil Procedure Code, 1908, substituted for s. 539 of the Code of 1882 as amended in 1888.

[2] Not in case of wrongs committed against the trust property by third persons, *Jawahra* v. *Akbar Hossein*, 7 All., 178 (1884); *Vishvanath Govind*, 15 Bom., 148 (1890); nor, apparently, even in the case of an alienation amounting to a breach of trust by the *mutawalli*, if the object of the suit is merely to cancel the alienation and recover the property from the alienee, that not being one of the forms of relief specifically mentioned; *Lakshmandas* v. *Ganpatrav*, 8 Bom., 365 (1884); *Kazi Hassan*, 24 Bom., 170 (1899); *Muhammad Abdullah Khan*, 21 All. 187 (1899); *Jamaluddin* v. *Mujtaba Husain*, 25 All., 631 (1903); and *Dasondhay* v. *Muhammad Abu Nasar*, 33 All., 660 (1911). In all these cases it was held that what was then s. 539 did not apply, so that there was nothing to prevent such suits from being instituted without obtaining permission from the Advocate-General, even if that section were held to be not permissive but mandatory, as the present s. 92 is expressly declared to be (*v. inf.*).

On the other hand in *Sajedar Raja* v. *Baidyanath Deb*, 20 Cal., 397 (1892), the Court was of opinion that a suit of this nature might have been, and ought to have been, instituted under s. 539, and accordingly in *Sajedur Raja Chowdhry* v. *Gour Mohun Das*, 24 Cal., 418 (1897), a suit by different plaintiffs against the same defendants, arising out of the same breach of trust, as trustee and alienee respectively of the temple property, was held to have been rightly instituted under that section. This decision, however, was dissented from in the later case of *Budh Singh Dudhuria*, 2 Cal. L. J., 431 (1905), and mentioned with disapproval in *Budree Das Mukim*, 33 Cal., 789 (1906).

[3] Or the Collector of the district, with the previous sanction of the Local Government, or such officer as the L. G. may appoint on his behalf; *e.g.* the Legal Remembrancer, as in *Muhammad Aziz-ud-din*, 15 All., 321 (1893).

[4] This form of relief was not specifically mentioned in the old s. 539, and there had been conflicting decisions as to whether it was covered by the clauses as to "appointing new trustees," and "vesting property in trustees," or by the general words "further or other relief," the Madras High Court though not the other High Courts, holding that it was not; *Rangasami* v. *Varadappa*, 17 Mad., 462 (1891); *Budree Das Mukim* (cited above), at p. 810. Where a *wakf* was for public purposes of a religious or charitable nature, no suit for the removal of a mutawalli can be maintained except in conformity with sec. 92 (1) of the Code of Civil Procedure; 1908: *Saiyid Ali*, 35 All., 98 (1912).

[5] In *Sajedur Raja Chowdhry*, cited above, the nearly identical clause of the old section was considered to bring within its purview a suit to set aside an improper alienation and to revest the property, in the alienating trustee or his successor; but the general current of decisions is, as we have seen, adverse to this construction.

[6] This clause is new.

[7]. In settling a scheme, under the old Code of Civil Procedure, 1882, sec. 539, [and the corresponding section of the Code of 1908, sec. 92 (*g*)], for a Muhammadan public trust, religious or charitable, such as a mosque, the Privy Council has held that the Court has complete discretion. It may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but its primary duty is to consider the interests of the general body of the public for whose benefit the trust was created. It may vary any

rule of management which it finds either not practicable or not in the best interests of the institution. *Mahomed Ismail Ariff*, L. R., 43 I. A., 127 (1916).

[8] This sub-section is new, and settles a question which was much debated concerning the old section, as to whether it was mandatory or permissive, restrictive or cumulative. See the cases collected in *Budree Das Mukim*, cited above.

A dispute as to the right to succeed to the *tauliat* or trusteeship of a *wakf* (that being a right of a public nature) cannot be referred to arbitration under s. 20 of the Civil Procedure Code. *Muhammad Ibrahim*, 32 All., 503 (1910).

Proceedings for the protection of mosques, &c.

343.[1] In all parts of British India except the Presidency of Bombay,[2] and except some of the "Scheduled Districts,"[3] and also in the district of Canara in the Presidency of Bombay,[4] any person interested[5] in any mosque, temple, or other religious establishment of a public nature and supported by endowments of land,[6] or in the performance of the worship or service thereof, or of the trusts relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the principal Court of original civil jurisdiction of the district in which the establishement is situate[7] the trustee,[8] manager, superintendent of such mosque, &c., or *any** member of any committee appointed under the Act, for any misfeasance, breach of trust, or neglect of duty in respect of the trusts vested in or confided to them respectively, and the Court may direct the specific performance of any act by such trustee, manager, or member of a committee, and may decree damages and costs against, and may also direct the removal of, such trustee, manager, superintendent, or member of committee.

The leave of the Court must be obtained before instituting a suit under this section.[9]

[1] This is substantially s. 14 of the Religious Endowments Act, XX of 1863, the main object of which was to relieve British executive officers from the distasteful duty of superintending the details of non-Christian, and especially of idolatrous worship. Whereas previously the trustee, manager, or superintendent of every religious establishment not purely of a private nature was either (*a*) nominated or confirmed by the Local Government or some public officer, or (*b*) if appointed independently of the Government in the manner prescribed by the founder or by usage, was supervised by the Board of Revenue, it was provided by this Act that in case (*a*) the property belonging to the establishment, and the powers hitherto exercised by the Board of Revenue, should be transferred to a committee of persons professing the religion in question (the first members appointed by the Local Government but vacancies filled up by election); and

* "*One*" in the Act as printed.

that in case (*b*) the property should be simply transferred to the trustee, manager, or superintendent, and the control of the Board of Revenue withdrawn. Thus in case (*a*) the " trustee, manager, or superintendent " is practically only a manager under the Committee, in whom the property is vested and to whom he is required to submit regular accounts (s. 13), while in case (*b*) the corresponding functionary is now subject to no executive control ; but in both cases he of course remains amenable to the jurisdiction of the ordinary civil tribunals, and s. 14 provides appropriate remedies for misfeasance or neglect of duty.

[2] The Act applies in terms to the Presidencies of Bengal and Madras, the former of which includes technically all territories not included in either of the other Presidencies.

[3] As to these, see the Scheduled Districts Act, 1874, and Ilbert, Gov. of India, p. 214. Act XX of 1863 appears to be in force in a considerable number of these districts.

[4] Bombay Act, VII of 1865.

[5] The interest need not be pecuniary or direct. " Any person having a right of attendance, or having been in the habit of attending at the performance of the worship or service of any mosque, temple, or religious establishment, or partaking in the benefit of any distribution of alms, shall be deemed to be a person interested [within the meaning of s. 14]." S. 15 of the Act.

[6] See *Jan Ali* v. *Ram Nath Mundul*, 8 Cal., 32 (1881), where it was pointed out that the mosques, &c., to which this Act is applicable are those with which Reg. XIX of 1810 was concerned, and that the description of those establishments is to be found in the preamble to that Regulation, which speaks of " endowments granted in land for the support of mosques, Hindu temples, colleges, and other pious and beneficial purposes," and describes the mischief to be remedied as consisting in the misappropriation of the produce of those lands contrary to the intention of the donors, to the personal use of individuals in immediate charge and possession of such endowments. Hence it was laid down in that case (p. 40) that s. 14 would be applicable if the mosque in question was one for the support of which endowments in land had been granted by the Government or by individuals. On the other hand the necessity for the sort of supervision contemplated would not arise in the case of a building destined exclusively for the domestic worship of the founder's family, even assuming a perpetual endowment of that kind to be valid ; see *Delroos Banoo Begum*, 15 B. L. R., 167 and 23 W. R., 453 (1875), and *Muthu* v. *Gangathara*, 17 Mad., 95 (1893).

It is not necessary to show that the establishment was in existence in (1863), nor (so far as s. 14 is concerned) that the right of nominating or confirming the manager was vested in the Government ; *Ganes Sing*, 5 B. L. R., Ap., 55 (1865) ; *Dhurrum Singh*, 7 Cal., 707 (1881) ; *Fakurudin* v. *Ackeni*, 2 Mad., 197 (1880) ; *Sheoratan*, 18 All., 227 (1896) ; *Sivayya*, 22 Mad., 223 (1899).

[7] See the definition of " Court " and " Civil Court " in s. 2 of the Act.

[8] Whether the trustee is hereditary or elected, *Fakurudin* (*ubi suprá*) ; but *not* a purchaser of temple (or mosque) property from the trustee, according to *Sivayya*, dissenting from *Sheoratan* (both cited above on another point). Supposing the former ruling to be correct, the question may arise whether a suit to set aside an improper alienation by the trustee (to which the purchaser would of course have to be made a party) would not be covered by the words " vesting any property in a trustee " in clause (*c*) of s. 92 (1) of the Civil Procedure Code (s. 342, *ante*). If so, proceedings must now be taken under that section, and with the permission therein mentioned.

[9] S. 18 of the Act.

Suits not governed by the preceding sections. Doubt as to right of worshipper to sue alone.

344. Where a person interested in a public mosque, simply as an habitual worshipper, has a complaint to make which cannot be met by any of the modes of redress specified in s. 342 (s. 92 of the Civil Procedure Code 1908), whether or not it is provided for by s. 343 (Act XX of 1863, ss. 14 and 18),[1] he may sue the alleged wrong-doer in any Court of competent jurisdiction without reference to the requirements of either of those sections; and he can do so in his individual capacity without first obtaining leave, under Rule 8 of Order I of the first Schedule of the Civil Procedure Code,[2] to represent all other persons similarly interested, and without giving notice to all such persons as required by that Rule,[3] but in such a case, the decision will only be binding as between the actual parties, and not on the Muhammadan community in general.[4]

[1] As shown above, s. 343, the modes of relief provided by the Act of 1863 and not by s. 92 of the Civil Procedure Code are (1) directing specific performance of some act by a trustee or manager, or member of committee, and (2) awarding damages and costs against such parties. This enactment, unlike the other, has always been considered to be cumulative, not restrictive; that is, it provides an additional remedy in certain cases, but does not bar any other remedy that there may be under the ordinary law; *Syed Amin Sahib*, 4 Mad. H. C., 112 (1868); *Satapayyar* v. *Periasami*, 14 Mad., 1 (1890), at p. 14.

[2] Corresponding with s. 30 of the Code of 1882, as to which see next note.

[3] This is the law as interpreted by the Allahabad and Madras High Courts, but dissented from by the Calcutta High Court. As to Allahabad, see the Full Bench ruling in *Jawahra* v. *Akbar Husain*, 7 All., 178 (1884), which was followed in *Muhammad Alam*, 32 All., 631 (1910), and in other Allahabad cases, the latest of which is *Ram Chandra*, 35 All., 197 (1913). The Calcutta ruling *Jan Ali* v. *Ram Nath Mundul*, 8 Cal., 32 (1881) is adverse to this; but it was dissented from by the Allahabad High Court in Jawahra's case. In *Srinivasa Chariar*, 23 Mad., 28 (1897), the plaintiffs were not only worshippers at a Hindu temple, but were also entitled to vote at the election of temple managers; and Shephard, J., while holding that the omission of the course prescribed by s. 30 was not fatal to the suit, nevertheless considered it so inconvenient that a judgment should be pronounced which would not bind other persons not named on the record, and on whose behalf objection had been taken, that he would not allow the suit to proceed except upon terms of amending the plaint and obtaining the requisite leave.

[4] *Ram Chandra* v. *Ali Muhammad*, 35 All., 197 (1913).

Wakf cannot be enforced by a mere stranger.

345. The general principle of law, that possession is a sufficient title as against a mere trespasser, applies in favour of a person who is in possession of property as purchaser from the heirs of a deceased proprietor, as against a person who alleges that the deceased proprietor dedicated the

property as *wakf*, but fails to show any title in himself to the office of *mutawalli*, or that he is interested in the endowment as a beneficiary.

Ismail Ariff v. *Mahomed Ghous*, 20 Cal., 834 (1893). The alleged *wakf* was for the purpose of defraying the expenses of lighting and repairing an already existing mosque, and of the support of poor persons. The plaintiff asked for a decree declaring him to be sole and absolute owner, and obtained instead a declaration that he was "lawfully entitled to possession." The complaint against the defendant was that he had served notices to quit as if he were owner, and his defence (which he failed to establish) was that he had been appointed *mutawalli*. Thus the question, whether he [the defendant] would have been admitted as a beneficiary, that is as a worshipper interested in the lighting and repairing of the mosque, for execution of the trusts of the alleged *wakfnama*, and for appointment of a *mutawalli*, was never raised.

346. When the Court, in the exercise of its charitable jurisdiction, is called upon to adjudicate between conflicting claims of dissident parties in a community distinguished by some religious profession, the rights of the litigants will be regulated by reference to the religious tenets held by the community in its origin, and a minority holding those tenets will prevail against a majority which has receded from them.

Rule of decision between conflicting parties in a sect.

The Advocate-General of Bombay, ex relatione Daya Muhammad v. *Muhammad Husen*, 12 Bom. H. C., 323 (1866). Compare the decision of the House of Lords in the famous case of *The Free Church of Scotland (General Assembly of)* v. *Lord Overtoun* (1904), Appeal Cases, 515.

SPECIAL RULES AS TO ENDOWMENTS FOR MUHAMMADAN PUBLIC WORSHIP.

347. When once a building has been dedicated as a public mosque[1] (at all events, if the contrary is not expressly declared in the deed of endowment), every Muhammadan has a right to enter it for the purpose of worship, and to join in the congregational worship in any manner sanctioned by the Muhammadan Ecclesiastical Law.[2] And it seems that the points of ritual in which the four schools of the Sunni sect differ are not such as ought, in the view of any school, to prevent followers of another school from taking part in the same service.[3]

Right of worship in a public mosque.

Illustrations.

(*a*) The Hanafi practice is to mutter the word *amin* softly at a certain point in the service, whereas the Shafeis pronounce it in a loud voice. Though the majority of the worshippers in a particular congregation may be Hanafis, they have no right to object to any Shafeis who may be present making the response in their own fashion, so long as they do so with the honest intention of performing a religious duty, and not maliciously for the purpose of annoying their fellow-worshippers.[3]

(*b*) The Imam appointed to conduct service in a mosque built by Hanafis adopted the Shafei ritual as regards pronouncing the "amin" loudly, and also on the point of raising the arms in prayer. Certain members of the congregation, who disapproved of the change, made arrangements for separate worship in the same mosque under an Imam appointed by themselves. It was held that the changes introduced by the first Imam were not such as to disqualify him for leading the worship of a Hanafi congregation, and that he and the *mutawallis* who appointed him were entitled to an injunction restraining the proceedings of the dissentients.[4]

(c) Dissenting Muhammadans (*e.g.* the new and hitherto unrecognised sect of Kadianis or Ahmadis) are entitled to enter a mosque and offer up prayers with the regular congregation behind the recognised Imam, but they are not entitled to pray as a separate congregation behind an Imam of their own in a mosque which has always been used by orthodox Muhammadans.[5]

[1] As to what amounts to effectual dedication as a *masjid*, or mosque, see under s. 320, *ante*.

[2] *Per* Mahmood, J., in *Q.-E.* v. *Ramzan*, cited below. "Every Muhammadan" is wide enough to include Shias saying their prayers quietly in a Sunni mosque; and though the remark was extra-judicial so far as they are concerned it seems to agree with the general practice in British India, and to have some ancient authority in its favour. See Ameer Ali, M.L., Vol. I, p. 311.

[3] *Ata-Ullah* v. *Azim-ullah*, 12 All., 494 (1889); *Jangu* v. *Ahmad-Ullah*, 13 All., 419 (1889). Though reported in different volumes, these two cases appear to have been decided on consecutive days, and by a Full Bench composed of the same judges. They support on this point the views previously expressed by Mahmood, J., in *Queen-Empress* v. *Ramzan*, 7 All., 461 (1885), at pp. 473 474.

[4] *Fazl Karim* v. *Maula-Baksh*, 18 Cal., 448 (1891), a Privy Council decision reversing that of the Calcutta High Court. In all these three cases the innovators belonged to a body calling themselves Amil-bil-Hadis* (followers of the traditions) and called by their opponents Wahabis, but who at all events were Sunni Moslems following the Shafei ritual in the two points in question.

[5] *Hakim Khalil Ahmad*, 2 Patna L. J., 108 (1916).

Minority may worship according to their own ritual.

348. If a breach of the peace takes place in a mosque in consequence of some members of the congregation objecting to the exercise by others of the modes of devotion referred to in the preceding section the apportionment of criminal responsibility for the occurrence will not depend upon the question which party is in the majority, nor upon the length of time during which one mode of devotion or the other had prevailed in that particular mosque, nor upon the school to which the founder might happen to belong, but primarily upon the question, which party endeavoured to prevent the other

* Or, Ahlu'l Hadith; see Abdur Rahim, Muhammadan Jurisprudence, p. 176.

from worshipping in their own fashion. In order to shift the responsibility it will be necessary to show, not merely that the person interfered with knew that he was likely to provoke angry feelings by the exercise of his right, but that his predominant motive was a desire to cause annoyance rather than a sense of religious duty.

In *Queen-Empress* v. *Ramzan*, 7 All., 461 (1885), the Cantonment Magistrate of Benares had convicted some (so-called) Wahabis under s. 296 of the Penal Code, of the offence of voluntarily disturbing an assembly engaged in religious worship, by uttering the "*amin*" in a loud tone of voice. The Full Bench (Mahmood, J., dissenting) ordered the case to be re-tried, and that in re-trying it the Magistrate should have regard to the following questions, namely :—

(1) Was there an assembly lawfully engaged in religious worship ?

(2) Was such assembly, in fact, disturbed by the accused ?

(3) Was such disturbance caused by acts and conduct on the part of the accused by which he intended to cause such disturbance, or which acts and conduct, at the time of such acts and conduct, he knew or believed to be likely to cause disturbance ?

The dissent of Mahmood, J., depended (to use his own expression) upon mixed considerations of the meaning of the Indian Penal Code, and of the Muhammadan Ecclesiastical Law. His view of the latter being that ultimately adopted by his colleagues and embodied in my text, he considered it unnecessary to inquire whether the congregation had been "voluntarily disturbed" within the meaning of s. 296 of the Penal Code (though upon the evidence as recorded he thought they had not), because the accused would in any case be protected by s. 79, which embodies the elementary proposition that nothing is an offence which is done by any person who is justified by law in doing it, and because (quoting from the judgment in the English case of *Beattie* v. *Gillbanks*, L.R., 9 Q. B. D., 308) "there is no authority for the proposition that a man may be convicted of doing a lawful act if he knows that his doing it may cause another to do an unlawful act."

In the subsequent case of *Ata-ullah* above referred to, Straight, J., as having been one of the judges who took part in the case of *Q.-E.* v. *Ramzan*, remarked incidentally : "What I understood to be found in that case was that Ramzan, having gone into the mosque with the deliberate intention, not of performing his devotions as a Muhammadan, but of creating disturbance, and of preventing other people from performing their prayers, bawled out the word '*amin*' in a noisy and disorderly fashion, and a disturbance was the result of his conduct. I believe that subsequently, when the case came back from the magistrate, this was the conclusion at which the majority arrived."

In the same case Edge, C. J., while affirming the right of the plaintiffs to pronounce the "*amin*" in their own fashion, observed on the other hand : "It must be distinctly understood that I entertain no doubt that a Muhammadan would bring himself within the grasp of the criminal law who, not in the *bonâ fide* performance of his devotions, but *malâ fide* for the purpose of disturbing others engaged in their devotions, makes any demonstration, oral or otherwise, in a mosque, and disturbance is the result."

In the same case Mahmood, J., said : "I hold that there is no authority in the Muhammadan Ecclesiastical Law to limit the tone of voice in which the word '*amin*' is to be pronounced ; that so long as the plaintiffs-appellants are Muhammadans, as we have found they are, so long they are entitled to enter

a mosque and perform the worship and say the word '*amin*' without anything to restrain their tone or note of the octave. But if the pronouncing of the word '*amin*' results in a disturbance of peace, that, of course, will have to be dealt with under the criminal law. But the matter remains that where the word '*amin*' is pronounced aloud, in the honest exercise of conscience that it should be so pronounced, there can be neither offence under the criminal law, nor any wrong in the civil law."

In the recent case of *Abdus Subhan*, 35 Cal., 294, (1908), the above observations were quoted with approval and followed, the plaintiffs' right to worship in their own way being declared subject to the proviso that in exercising it they must not interrupt the worship of others.

Reading these judgments in connection with the facts that in all the cases the majority of those attending the mosque were Hanafis, unaccustomed, until quite recently, to any other than the Hanafi mode of making the responses, and that in one case at least (*Q.-E.* v. *Ramzan*) the founder of the mosque was positively known to have been a Hanafi, we seem to get the result in the text.

Doubt as to effect of express restriction in the deed of endowment.

349. Whether a deed purporting to dedicate a building as a mosque for the exclusive use of persons worshipping according to the Hanafi ritual would be altogether valid, or altogether void or valid as to the dedication and void as to the reservation, is a question which has not yet been definitely raised in any Indian High Court, and with respect to which the ancient authorities do not appear to be conclusive.

In *Ata-Ullah's* case, at p. 500, Edge, C. J., said: "No authority has been brought to our notice to show that a mosque which has been dedicated to God can be appropriated exclusively to or by any particular sect or denomination of Sunni Muhammadans; and without very strong authority for such a proposition I, for one, could not find as a matter of law that there could be any such exclusive appropriation. As I understand, a mosque, to be a mosque at all, must be a building dedicated to God, and not a building dedicated to God with a reservation that it should be used only by particular persons holding particular views of the ritual. As I understand it, a mosque is a place where all Mohammadans are entitled to go and perform their devotions as of right, according to their conscience." These observations were not necessary to the decision, the only fact found being that the mosque in question had been exclusively used by Hanafis, and there being no suggestion of any restrictive clause in the deed of endowment.

In *Fazl Karim*, 18 Cal. at p. 458, their Lordships referred to this *dictum*, no doubt by oversight, as though it had been an actual *ruling* of the High Court of the North-West Provinces. They went on, however, to say that the facts of the case before them did not properly raise that question, because it did not appear that the mosque ever was intended to be appropriated to any particular sect, and they therefore declined to express any opinion upon it. In *Jangu* v. *Ahmad-Ullah*, 13 All., 419 (1891), at p. 429, Mahmood, J., had expressed the same view, but referred to no authority except by combining in one loose paraphrase the two separate statements of the Hedaya, that (1) *wakf* generally implies that the thing appropriated becomes a property of God by the advantage resulting from it to His creatures (Hed. 231), and that (2) a mosque is so appropriated so soon as public prayer had once been offered in it (Hed. 239); both of which statements are perfectly compatible with the resulting

advantage being restricted to some particular subdivision of that section of God's creatures known as Sunni Muhammadans.

It will be shown in Chap. XIII, (see sec. 417 *post*), that, in the Shafei schools at all events, there is clear authority for the validity of such a restrictive clause, and if the Hanafi Law is really different, one would rather have expected to find some notice of the antinomy in the Hedaya.

In *Delroos Banoo Begum*, 15 B. L. R., 167 (1875), the alleged *wakf* provided among other things for the regular performance of certain ceremonies by the *mutawallis* in a building, or portion of a building, called an *imambara*. The Calcutta High Court held that this was not a public religious endowment within the meaning of Act XX of 1863, and distinguished an *imambara* from a mosque in the following terms: "An *imambara* is not a place of public worship, as is a mosque or temple, but an apartment in a private house, set apart, no doubt, for the performance of certain Mohurrum ceremonies, but no more open to the general public than a private oratory in England would be. As a matter of fact strangers are ordinarily excluded from these celebrations." This was a Shia case, and the practice of dedicating such private *imambaras* may perhaps be peculiar to Shias, but whether Shia or Sunni, the validity of such endowments must stand or fall with that of family settlements (as to which, see above, ss. 323, 323A), and is on quite a different footing from the kind of restrictive clause now under discussion.

Mr. Ameer Ali naturally holds, in accordance with his general view of the family *wakf* controversy, that "though the public may have no right in a private mosque, it may constitute a good *wakf* so as to exclude the right of the heirs over it."

The policy of the last fifty years has been, *first*, to introduce a distinction unknown alike to Hindus and to Muhammadans, as it was to the Elizabethan legislators in England, between "religious" and "charitable" purposes, and to transfer the protection of religious endowments from the executive to the judicial branch, or rather to afford protection only through the latter, instead of through both, as in England; and *next*, to allow the judicial tribunals to protect themselves against too importunate demands for their protection by an elaborate network of artificial obstructions, partly the creation of the Legislature and partly of their own ingenuity. Both steps may have been unavoidable. It may have been, for reasons already indicated, impracticable to entrust any branch of the Indian executive with functions corresponding to those of the English Charity Commissioners, and it may well be that, if there had been nothing to check the natural flow of litigation, and no alternative channel for complaints, the strain would have been too great for the Civil Courts as at present constituted. But if the policy adopted was unavoidable, so also are the frequently recurring complaints that the funds of religious endowments are misapplied. A solution may possibly be attempted, with the growth of autonomous institutions in India.

CHAPTER XII.

PRE-EMPTION.

The existence of the right of Shaffa is repugnant to analogy, as it involves the taking possession of another's property contrary to his inclination; whence it must be confined solely to those to whom it is particularly granted by the law.—*Hedaya.*

He whom you suppose to have lost nothing by a forced exchange in reality has lost.—*Bentham.*

The right to pre-emption is founded on the supposed necessities of a Mahomedan family, arising out of their minute division and inter-division of ancestral property; and as the result of its exercise is generally adverse to the public interest, it certainly will not be recognised by this Court beyond the limits to which those necessities have been judicially decided to extend.—*Phear, J.*, im *Nusrut Raza*, 8 W. R., 309 (1862).

WHAT IT IS, AND TO WHOM APPLICABLE.

Nature of the right.

350. The right of pre-emption is a right to acquire by compulsory purchase, in certain cases, immovable property in preference to all other persons.[1]

On what grounds recognised.

It is not one of the matters in suits respecting which the Muhammadan Law is expressly declared to be the rule of decision when the parties are Muhammadans. But the Courts of British India have, on grounds of justice, equity, and good conscience, generally administered the law as between Muhammadans in claims for pre-emption.[2]

Rejected in the Madras Presidency.

In the Madras Presidency the right of pre-emption is not recognised even between Muhammadans,[3] unless by local custom, as in Malabar.[4]

[1] In *Gobind Dayal*, 7 All. (1885), at p. 799, Mahmood, J., defined pre-emption as "a right which the owner of certain immovable property possesses as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property not his own, on such terms as those on which such latter immovable property is sold to another person"; and he added that he could easily support every word of this definition by original Arabic texts of the Muhammadan Law itself.

[2] See the case above mentioned, and the earlier case of *Chundo* v. *Alimooddeen*, 6 N. W., 28 (1873), both Full Bench decisions of the

High Court of Allahabad. In both cases the majority of the judges based their recognition of pre-emption on "justice, equity," etc., while Spankie, J., in the earlier, and Mahmood, J., in the later, case insisted that it was covered by the express words of the Bengal, N. W. P., and Assam Civil Courts Act as a "religious usage or institution," being based on the Sunna, which is confessedly only a little less sacred than the Koran. The other judges did not fail to point out that this reasoning proves too much, because it would render the whole of the Muhammadan Shariat binding on the British Courts, and would make the specific enumeration of marriage, inheritance, etc., unmeaning. But the argument of the majority was only a little better, for if the vague words, "justice, equity, and good conscience" are wide enough to cover this particular rule of Muhammadan Law, why should they not let in the whole Muhammadan Law of property and contract? The best that can be said for it is, that some portions are more firmly rooted in the sentiments of the Moslem community than other portions and that the judges may possibly have had good reasons for believing this to be the case with pre-emption.

It is permissible to suggest, however, that the recognition of pre-emption became inevitable in Northern India on account of the system of land revenue and record of rights (wajib-ul-arz) with which it is intimately bound up. This system was created by the Muhammadans and was taken over bodily by the Anglo Indian administration. Most of the old Wajib-ul-arzes refer to pre-emption and the distinction carefully drawn by the Allahabad High Court in numerous cases, between a Contract of Pre-emption and a Custom of Pre-emption, as shown by any particular Wajib-ul-arz, shows that, even apart from custom and apart from the religion professed by land-holders, such contracts were incidents in the tenure of land; *e.g.*, see *Gokal Singh*, 7 All., 772 (1885); *Ali Nasir Khan*, 25 All., 90 (1902). For an instance of the recognition of the principle of pre-emption in a contract of sale between a Hindu and a Muhammadan in the Bombay Province (Kolaba District), see *Sitaram Bhanrao*, 41 Bom., 636 (1917). Custom or contract.

[3] *Ibrahim Saib*, 6 Mad. H. C., 26 (1870). This was a claim of pre-emption on the ground of vicinage by a Muhammadan against a Muhammadan vendee *and a Hindu vendor;* which last fact would by itself have been a sufficient ground for dismissing the suit.* But Holloway, C. J., took the opportunity of laying down broadly that the Muhammadan rule of pre-emption was not law in the Madras Presidency. He said (Innes, J., concurring):—

"It is clearly not so by positive enactment, or by customary law assimilating the rule of positive law, and making it an existent rule of our law. It is needless to add that it is not so, as the so-called *lex loci rei sitae*, and therefore governing matters connected with the alienability and other incidents of real property. The question, therefore, resolves itself into whether it is consistent with equity and good conscience to import an exceptional rule opposed to the principle of law administered here—perfect freedom of contract.

"The word pre-emption is a little deluding. That was an institution known to Roman Law and sanctioned an obligatory relation between the vendor and a person determined, binding the vendor to sell to that person if he offered as good conditions as the intended vendee. It arose from contract and also from provisions of positive written law. It was protected solely by a personal action, and gave no right of action against the vendee to whom the property had been passed.

"The so-called pre-emption of Muhammadan Law resembles the Retract-recht (*jus retractus*) of German law. It is an obligation attached by written

* It was, in fact, the ground taken by the Lower Court.

or customary law to a particular status which binds the purchaser from one obliged to hand over the object-matter to the other party to the obligation on receiving the price paid with his expenses. The action in German, as in Muhammadan, Law is exercisable at the moment at which the property is handed over to the purchaser.

"The right *ex jure vicinitatis* was one of six sorts, and, like all the rest, was based upon a notion that natural justice required that such preference should be accorded to certain persons having specific relations of person or property to the vendor. It was once, as an enthusiastic Germanist admits, so used as to put the most unreasonable restraints upon the right of alienation. With more enlightened notions of the public weal, nearly every trace of it has disappeared, and it can no longer be considered a principle of the common law of Germany. While it existed the antidote to its baneful influences was, as in Muhammadan Law, the favouring of subtle devices for its defeat, and the attaching of short periods of prescription to its exercise. It cannot be 'equity and good conscience' to introduce propositions which the history of similar laws shows by experience to be most mischievous. If introduced at all, it must apply to all neighbours. The Muhammadan Law binds Muhammadans no more than others, except in the matters to which it is declared applicable. It is then law because of its reception as one of our law sources in the matter to which it applies. Where, however, not so received, it can only be prevailing law because consistent with equity and good conscience. I am of opinion that it is manifestly opposed to both, that no such obligation in this Presidency binds a Muhammadan or any one else, and that this appeal must be dismissed with costs."

[4] *Krishna Menon*, 20 Mad., 305 (1897).

Where applicable among non-Muhammadans.

351. A right or custom of pre-emption is recognised as prevailing among Hindus in Bahar and (on the other side of India) in Gujrat; but in districts where its existence among non-Muhammadans has not been judicially noticed, it must be proved by the person who asserts it.

When the custom has been shown to exist, it is presumed to be founded on, and governed by, the Muhammadan Law, unless the contrary be shown. The Court may, as between Hindus, administer a modification of that law on proof of a custom to that effect, but the Calcutta High Court has held that this can only be done as regards the circumstances under which the right may be claimed, not as regards the preliminary forms to be observed before assertion of the right by suit.[1]

A custom to dispense with one of the preliminary forms, namely, the "immediate demand," has been recognised by the Allahabad High Court as modifying the general custom of pre-emption among the Hindu inhabitants of a certain quarter of the town of Muzaffarnagar.[2]

[1] *Fakir Rawot*, B. L. R., Sup. vol., p. 35 (1863). Sir Barnes Peacock, from whose judgment the two first paragraphs are (except as to Gujrat) taken almost *verbatim*, went on to remark that " in this requirement (as to the preliminary forms) we see no evil, inasmuch as a right of pre-emption undoubtedly tends to restrict the free sale and purchase of property, and it is desirable, therefore, to encompass it with certain rules and limits lest the right should be exercised vexatiously." And see *Sheojuttun*, 13 W. R., 188 (1870); *Jadu Lal Sahu*, 35 Cal., 575 (1908), at p. 585; affirmed on appeal by the Privy Council, L. R., 39 I. A., 101 (1912).

As to Gujarat, the High Court of Bombay expressed itself as follows, in *Gordhandas*, 6 Bom. H. C., 263 (1869) :—

" The District Judge was in error in holding that no such local custom as the right of pre-emption exists among the Hindus in Gujarat. There have been many cases disposed of in the Surat and Broach Adalats, and upheld by the late Sadr Diwani Adalat, in which the custom is admitted. *Narun Nuranee* v. *Premchund Wullubb*, 9 Harrington, p. 591, is a case in point. The custom exists also in the Bengal Presidency (see 7 Cal. S. D. A., Rep. 129, and many other cases quoted in Morley's Digest, vol. i, p. 537, part. 11). There is no doubt that the custom in Gujarat is the Muhammadan right of pre-emption, or *hak shafi*, and therefore that in deciding such a case as the present it is to the particulars of that law that we must look for guidance."

Even as to Gujarat, Beaman, J., in an Ahmedabad case, threw some doubts as to the unquestioned applicability of the custom and suggested insistence upon a stricter proof in future cases : *Duhyabhai Motiram*, 38 Bom., 183 (at p 188) (1913); and this doubt was supported by Batchelor, J., in *Mahomed Beg Amin*, 40 Bom., 358 (at p. 366). All that the latter case decided was that pre-emption is not recognised in the District of Khandesh; the vendee in the case was a Hindu.

The general rule was thus expressed by Mahmood, J., in *Sheo Narain* v. *Hira*, 7 All., 535 (1885). " Even though the right is not claimed under the Muhammadan Law, but under a custom recognised in the *wajib-ul-arz*, the rules of the Muhammadan law must be applied by analogy, because equity follows the law, and the only system of the law of pre-emption to which we can look for equity to follow is the Muhammadan law." But in *Wajid Ali* v. *Shaban*, 31 All., 623 (1909), at p. 632, Richards, J., dissented from this proposition, and appeared to think that the analogy of Muhammadan law should only be applied in a pre-emption case arising out of custom, where that law appears to the Court to be reasonable.

The latest case is that of *Zamir Ahmad*, 37 All., 472 (1915). A suit for pre-emption was brought both under the custom recorded in the *wajib-ul-arz* and Muhammadan Law; but the incidents of the custom were not recorded in the *wajib-ul-arz*. It was held that the rights were co-extensive.

[2] *Jai Kuar* v. *Heera Lal*, 7 N. W., 1 (1874).

In explanation of the prevalence of the custom among non-Muhammadans, it should be mentioned that pre-emption is not one of those branches of Muhammadan Law the benefit of which was confined by that law itself to the true believers It is true that according to Shia doctrine pre-emption can be claimed by an infidel only against a purchaser who is also an infidel, while it can be claimed by a Moslem against a purchaser of any religion; but the Shia Law never obtained official recognition under the Mogul Empire (*Jog Deb Singh*, 32 Cal., 982 (1905), and according to the Hanafi authorities, which must be looked to as the source of any general territorial usage, Zimmis are entitled to exercise the right of pre-emption not only among themselves, but against Moslems

Does not apply to strangers holding land in the district.

352. Where the custom is judicially noticed as prevailing among non-Muhammadans in a certain local area, it does not govern non-Muhammadans who, though holding land therein for the time being, are neither natives of, nor domiciled in the district.

Illustration.

A Hindu, resident near Calcutta, but registered as a pleader in the Civil Court of Arrah, in the province of Bahar, purchased a share in land at Arrah and contracted to resell it. Though it was admitted that the custom of pre-emption prevails in Bahar, as stated in the preceding section, a claim of pre-emption on the part of his co-sharers was disallowed.

Byjnath Pershad, 24 W. R., 95 (1875); followed in *Parsashth Nath Tewari*, 32 Cal., 988 (1905), where the parts were reversed, the pre-emptor being the outsider.

Regulated by statute in the Punjab and Oudh.

353. In the Punjab there is no distinction between Muhammadans and non-Muhammadans as regards the right of pre-emption, nor are the special rules of the Muhammadan Law recognised by the Courts, but it is entirely regulated by Punjab Act I of 1913 (Punjab pre-emption Act). In the North-West Frontier Province, pre-emption is regulated by the N.-W. Frontier Province pre-emption Regulation, II of 1906, which applies, with certain modifications, the old Punjab Pre-emption Act, Punjab Act II of 1905, which has been, repealed for the Punjab itself. In Oudh, pre-emption is regulated by the Oudh Laws Act, XVIII of 1876.

See Appendix C.

Elsewhere often by local custom and agreement.

354. In other parts of India the Muhammadan law of pre-emption is not unfrequently modified by local customs, defined and confirmed by agreement among the landholders of the village or district and embodied in the settlement record.

For one example among many, see *Rup Narain*, 7 All., 478 (1884).

As to the effect which a *wajib-ul-arz* (village record of rights), which has ceased to be in force as a contract, may still have as evidence of a pre-existing custom of pre-emption, see *Sadhu Sahu*, 16 All., 40 (1893).

It was laid down in *Bhim Sen* v. *Moti Ram*, 33 All., 85 (1910)—following a case reported only in *Weekly Notes*, 1897, p. 3—that where it is not apparent, either from the language of the *wajib-ul-arz* itself or from other evidence, that

the pre-emption clause thereof is merely the record of a new contract between the co-sharers, the presumption is that it is the record of a pre-existing custom.

A statement in a *wajib-ul-arz* that there is a custom of pre-emption, which is not in contravention of law, is good *primâ facie* evidence of the custom, without corroborative evidence of instances in which it has been exercised. *Digambar Singh*, L. R., 42 I. A., 10 (1914).

The same case is an authority for the proposition that if, on partition, a fresh *wajib-ul-arz* is not prepared, it does not follow that a custom or contract in force before partition is no longer in operation; the circumstances of each case should be considered.

Where the *wajib-ul-arz* simply stated that "the custom of pre-emption (*shufaa*) prevails according to the usage of the country," and no evidence was offered of any special usage prevailing in that district, it was held that the formalities required in pre-emption by the general Muhammadan Law must be strictly observed; *Ram Prasad*, 9 All., 513 (1887), followed in several later cases. For a case in which a special rule (precedence as between different kinds of co-sharers) was laid down in the *wajib-ul-arz*, and was duly recognised by the Court, see *Jasoda Nand*, 13 All., 373 (1891).

In *Sheo Narain* v. *Hira*, 7 All., 535 (1885), it was laid down broadly by Mahmood, J., that, even though the right is not claimed under the Muhammadan Law, but under a custom recognised in the *wajib-ul-arz*, the rules of that law must be applied by analogy; but in the much more recent case of *Wajid Ali* v. *Shaban*, 31 All., 623 (1909), also a Full Bench case, the judges declined to be bound by this *dictum*, pointing out that his four brother judges, who silently concurred in the decision, must not be held responsible for his reasoning, and that there were cases in which it would be repugnant to equity and justice to apply the analogy of the Muhammadan Law to claims of pre-emption based on local custom.

It would be outside the scope of this work, and would add needlessly to its bulk, to notice the very numerous reported cases turning on the construction of particular phrases in a *wajib-ul-arz*, or on the question whether a particular instrument is to be treated as a contract or merely as a record of pre-existent custom. In the latter case it is settled that "it is not conclusive evidence of any custom, and where a plaintiff puts forward an unusual custom, and cannot point to a single instance of its exercise within the memory or knowledge of man the Court will be justified in holding that the plaintiff has not proved the custom." *Ganga Singh*, 33 All., 605 (1911).

354A. A pre-emptor can base his claim to pre-emption in the alternative, either on Muhammadan Law or on custom; and on a claim based on Muhammadan Law a Court can pass a decree based on a custom. How to claim pre-emption.

Abdul Hamid, 36 All., 573 (1914). It follows that a claim based on Muhammadan Law can be amended so as to base it on custom or put up in the alternative.

355. So far as the British Courts profess to be guided by the Muhammadan law of pre-emption, the rules observed are those set forth in ss. 356 to 378 inclusive. The Muhammadan Law of pre-emption.

Who can pre-empt.

356. When a Muhammadan, or other person governed by the Muhammadan law of pre-emption (hereinafter called a quasi-Muhammadan), has contracted to sell any immovable property, or his share in any immovable property, the right to be put in the place of the vendee on tendering to him the price which he had contracted to pay to the vender belongs in succession to such Muhammadans or quasi-Muhammadans as come within the following categories, namely—

(1) Co-sharers.[1]

(2) Owners of property connected with the property in question through some right in the nature of an easement,[2] whether such easements be attached to both properties as dominant tenements as against a third property, or to one of them as dominant against the other as servient tenement. Such persons are called "participators in the appendages."*

(3) Owners of contiguous immovable property.

(4) The Mutawalli of a mosque,[3] or the manager of a Court of Wards.[4]

[1] Baillie, Book VII, chap. ii, p. 476; Hed., Book XXXVIII, chap. i, p. 548, where it is said that the order of priority is founded on a precept of the Prophet. As to priority of (1) over (2), see *Golam Ali Khan*, 17 W. R., 343, (1872).

[2] That the owner of a dominant tenement has a right of pre-emption on the sale of the servient tenement, which is preferable to the right of a mere neighbour, was decided in *Karim* v. *Priyo Lal Bose*, 28 All., 127 (1905). *Baldeo* v. *Badri Nath*, 31 All., 519 (1909), shows, on the other hand, that the owner of a servient tenement can sell it without giving any right of pre-emption to the owner of the dominant tenement, if the vendor is a participator with the latter in another easement. In this case the would-be pre-emptor had a right to discharge water on to the property of the vendor, but the vendor enjoyed in common with the former a right to discharge water on to a lane that divided their houses.

That the owner of a servient tenement may claim pre-emption on the sale of land subject to the same easement, was decided in *Chand Khan*, 3 B. L. R., A. C., 296 (1864). There the claimant was the owner of the land through which the pre-empted land received irrigation, and Jackson, J., said: "It seems a more than usually reasonable claim, because it would be a matter of great consequence to the plaintiff that he should be able to acquire land in respect of which his own land was burdened with servitudes." On the other hand, the right to lateral support, as between either adjoining lands or adjoining houses, is only an incident of nighbourhood, not a "participation in the appendages"

* *Shâfi' Khâlit*, *i.e.*, a pre-emptor who is not a co-sharer—*Khâlit* means litterally "mixed with".

therefore the owner of a servient tenement—*e.g.*, one whose terrace receives the rainfall from the roof of the adjoining house—has a preferential right of pre-emption as compared with such a neighbour ; *Ranchoddas*, 24 Bom., 414 (1899). For an example of a claim by the owner of one dominant tenement against the owner of another dominant tenement in respect of the same easement (fishing rights, etc.), see *Mahtab Singh*, reported in 6 B. L. R., F. B., p. 43, footnote (1868), and *Shaikh Karim Buksh*, 6 N. W., 377 (1874).

[3] *Jinda Ram* v. *Hussain Bakhsh* : 49 Panj. Rec., 197 (1914). Though the decision was in the Panjab, which is governed by the statutory, and not the Muhammadan, Law of pre-emption, the question of the capacity of the Mutawalli of a mosque was discussed as a question of Muhammadan Law, and the principle of the ruling will probably be approved in other Provinces.

[4] *Jadu Lal Sahu*, L. R., 39 I. A., 101 (1912). In this case the competency of the manager of the estate of a "disqualified proprietor" under the Court of Wards in Bengal, was held to be covered both by sec. 40 of the Court of Wards Act (Bengal Act IX of 1879) as well as independently of it.

356A. The co-shareship, "participation in appendages," or ownership of contiguous property, as the case may be, must not only exist at the time of the sale which gives rise to the claim of pre-emption, but must continue to exist down to the time when the suit is instituted,[1] and (it seems) even down to the decree of the primary Court.[2] But where, without any change in the plaintiff's position, his right to pre-empt is sought to be defeated by the stranger-vendee re-selling to a co-sharer [or other person against whom there would be no right of pre-emption] the effect of the transaction seems to depend on whether it takes place before or after the institution of the suit.[3]

Fact on which the right depends must continue to date of suit.

[1] *Janki Prasad*, 21 All., 374 (1899), decided on general principles of civil procedure, rather than on any text of Muhammadan Law, the claim being one of pre-emption under a *wajib-ul-arz*, by a co-sharer who ceased to be such in consequence of a partition which took place after the sale to a stranger which gave rise to his claim, but before the institution of his suit.

[2] *Ram Gopal*, 21 All., 441 (1899), determining the question which had been expressly left open in the preceding case ; this also was a case of *wajib-ul-arz*, but it was remarked that the "analogy of the Muhammadan Law was not in favour of the plaintiff." The passages referred to, Hed. 562 and Baillie, 499 (502 in 2nd edit.), do in fact deal only with the death of the pre-emptor or a voluntary sale by him. The case of *Tafazzul Husain*, 32 All., 567 (1910), was one of pure Muhammadan Law, the property being *zamindari*, and the co-sharership, on which the plaintiff had based his claim to pre-empt, had ceased after the institution of the suit, but before decree, not by sale or any other voluntary act on his part, but by a partition effected at the instance of the vendee and other co-sharers. It was decided that the right of pre-emption was lost, chiefly on the analogy of the passage in the Hedaya dealing with the death of the pre-emptor, in which it is said that "the property must remain firm until the decree of the Kazi be passed." See also *Nuri Mian*, 44 Cal., 47 (1916).

[3] *Narain Singh*, 23 All., 247 (1901), distinguished from *Serh Mal* v. *Hukam Singh*, 20 All., 100 (1897). It should be noted, however, that under the general unmodified Muhammadan Law such a case could hardly arise, because pre-emption by one of several co-sharers would *ipso facto* entitle the others to share in the pre-empted property on paying their due proportions of the price (s. 358, *post*), so that they would have no inducement to make a separate bargain with the stranger-vendee. In both these cases the pre-emption was claimed under a *wajib-ul-arz*.

Where the rights of co-sharers depend upon a *wajib-ul-arz* which requires renewal at fixed periods, they do not cease to be co-sharers by the mere fact of a period of settlement having expired, consequently the right of pre-emption is not affected by the expiry of the period between the institution of the suit and the decree; *Gopal Prasad*, 31 All., 111 (1908).

Where it is shown that the original relief claimed has, by subsequent change of circumstances, become inappropriate, or that it is necessary to have a decision of the Court on the altered circumstances to shorten litigation or to do complete justice between the parties, the Court ought to take notice of events which have happened since the institution of the suit and mould its decree accordingly, *Nuri Mian*, 44 Cal., 47 (1916).

Can the claim be made against a non-Muhammadan vendee.

357. According to the rulings of the Allahabad High Court, it is necessary that both the vendor[1] and the pre-emptor[2] should be Muhammadans or quasi-Muhammadans, but the personal law of the vendee is immaterial.[3]

According to the latest Calcutta decisions, it is necessary that the pre-emptor, the vendor,[4] and the vendee[5] should all be persons governed by the Muhammadan Law of pre-emption.

[1] *Dwarka Das*, 1 All., 564 (1878), disapproving on this point, *Chundo* v. *Alimoodeen*, 6 N. W., 28 (1873), and following the Calcutta case of *Poorno Singh*, 18 W. R., 441 (1870); s.c., 10 B. L. R., 117.

[2] As to the pre-emptor, there has never been any doubt anywhere.

In *Qurban Husain*, 22 All., 102 (1899), the same principle was applied as against a Muhammadan of the Shia sect, who claimed pre-emption on ground of vicinage as against a vendor and vendee who were both Sunnis, the right in question being one allowed by Sunni, but not by Shia, Law. See s. 485, *post*.

[3] *Gobind Dayal*, 7 All., 775 (1885).

[4] *Poorno Singh*, referred to above. Before 1870 the current of decisions was on the whole the other way.

[5] *Kudratulla* v. *Mohini*, 4 B. L. R., F. B., 134 (1870). By comparing the five separate judgments delivered in this case with that of Mahmood, J., in *Gobind Dayal*, we obtain a very exhaustive view of the arguments on both sides of the question. The main contention of the majority of the Calcutta Full Bench was that to allow pre-emption against a non-Muhammadan purchaser would contravene Reg. VII of 1832 (then in force, but since repealed), which declares that "where one or more of the parties to the suit shall not be either of the Muhammadan or the Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of *any property to*

which, but for the operation of such laws, they would have been entitled." It was argued on the other side that the purchaser could not by any law be entitled to property which the vendor was by *his* law debarred from selling. It was therefore necessary to determine the question, does the Muhammadan Law really debar the vendor from selling? Is it, as Norman, J., put it (4 B. L. R., p. 155) that "the rule of pre-emption qualifies, and is an incumbrance on, the power of disposition possessed by a Mussulman owner of property"; or is it rather as Mitter, J., and Sir Barnes Peacock insisted, "nothing more than a mere right of re-purchase, not from the vendor, but from the vendee, who is treated for all intents and purposes as the full legal owner of the property which is the subject-matter of that right"?

In support of the latter view, it was urged that the pre-emptor can neither exercise nor waive his right until the sale to the stranger is completed. As Pearson, J., put it in *Chundo* v. *Alimoodeen*, "the vendor is not in the least degree interested in the matter of such a suit, and need not be considered; he has sold his property and received his price, and the transaction, so far as he is concerned, has come to an end before the right of pre-emption arises. That right is held by the Muhammadan Law to accrue, *after a sale*, to a neighbour or a partner, *viz.*, a right to purchase the property from the vendee for the same price which he gave for it." But Mahmood, J., had no difficulty in showing that a right may be vested, though the contingency on which it is exercisable has not yet happened, and that the inability to renounce the right beforehand may be quite sufficiently accounted for by the impossibility of knowing whether it will be for the pre-emptor's interest to do so until the name of a particular purchaser and the price have been disclosed, without concluding that it has, till then, no existence.

The statutory pre-emption law of the Panjab and Oudh requires the vendor to give notice when he *proposes* to sell a property or foreclose a mortgage (sec. 13, Panjab Laws Act, 1872; and sec. 10, Oudh Laws Act, 1876); and the payment or tender of the price is to be to the proposing vendor or mortgagee. The statutory right of pre-emption could therefore be exercised *before* the sale or foreclosure was completed.

Again, some stress was laid by the Calcutta judges on the point that the application of the rule of pre-emption to Muhammadans was not expressly enjoined by the Regulations then in force, like that of the Muhammadan laws of marriage and inheritance, but was a matter of "equity and good conscience"; that some of the devices for evading it, sanctioned by the Muhammadan Law itself, are such as a Court of Equity would deem fraudulent (see below, s. 391 and note); and that it would be inequitable to make the right of a non-Muhammadan vendee depend on his willingness to stoop to these fraudulent devices. The answer to all this is that a rule requiring credit to be given to a colourable representation is a rule of evidence, and that the British Courts may possibly have been justified in taking some account of the Muhammadan Law of Evidence at the date of *Kudratulla's* case, but certainly not since the passing of the Indian Evidence Act, 1872.

Lastly, the principle that the right of the pre-emptor does not arise until the vendor's interest in the matter has ceased, logically implies that the personal law of the vendor is immaterial; which seems to have been, in fact, the prevalent view at the date of *Kudratulla's* case, but which was, as we have seen, repudiated even by the Calcutta High Court in the subsequent case of *Poorno Singh*, 18 W. R., 441 (1872), as well as by the Allahabad Court in *Dwarka Das*, 1 All., 564 (1878). On the whole, therefore, it seems unlikely that the ruling in *Kudratulla's* case will be permanently maintained in Bengal, and still less likely that it will be followed elsewhere. It is submitted that the Allahabad rule is the true one.

Competition among pre-emptors.

358. In case of competition between pre-emptors belonging to different categories, the first category entirely excludes the second, and the second entirely excludes the third.[1] But if the claim be made by two or more persons belonging to the same category, they are entitled to equal shares of the pre-empted property on tendering their respective quotas of the purchase-money.[2]

Exceptions.—There may be cases in which one person is considered to be co-sharer with the vendor in a closer and more intimate sense than another, and is on that ground allowed precedence in respect of the right of pre-emption[3]; and there may also be cases in which a person who shares with the vendor the whole of a certain easement may have priority over one whose participation is less complete.[4]

Illustrations.

(*a*) A mansion is situate in a street which is not a public thoroughfare, and belongs to two persons, one of whom sells his share. The right of pre-emption belongs in the first place to the other partner in the mansion. If he surrenders his right, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous and those who are not so. If they all surrender the right it belongs to the owner of any house immediately contiguous to the house in question, even though not abutting on the private street.

(*b*) Within a mansion (court ?) which is situate in a street without a thoroughfare and which has several owners, there is a house belonging to two persons, and one of them sells his share in it. The right of pre-emption belongs first to the partner in the house, then to the partners in the mansion, and next to the people in the street, who are all alike. If all these give up their right, it belongs to the neighbour behind the mansion, who has a door opening into another street (and who is therefore simply a neighbour, and not a participator in the appendages).

(*c*) If, in the above case, there be another private street leading from the first-mentioned street, and a house in it is sold, the right of pre-emption belongs to the inhabitants of this inner street, "because they are more specially intermixed with it than the people of the other street." But if a house in the outer street be sold, the right of pre-emption belongs to the people of the inner, as well as to those of the outer, street, "for the intermixture of both in the right of way is equal."

(*d*) If there be two houses on opposite sides of a public street, and one of them is sold, there is no pre-emption, except for the adjoining neighbour.

(*e*) If there be a small channel from which several vineyards are watered, and some of them are sold, the owners of all the vineyards (called "partners" in Baillie's Digest) are pre-emptors, without any distinction between those who are, and those who are not, adjoining.

(*f*) The lower part of a house belongs to two persons, one of whom owns the upper part jointly with a third party, and sells his shares in both the lower and upper parts of the house. The partner in the lower has the right of pre-emption with regard to the share in it, and the partner in the upper with regard to the share in it; but the partner in the lower has no right of pre-emption in the upper, nor the partner in the upper any right of pre-emption in the lower; for the partner in the lower is only a neighbour to the upper, or a sharer in its rights (of easement) when the way to the upper is through the lower, and the partner in the upper is only a neighbour to the lower, or a sharer in its rights, when the way to the upper is through it.[5]

[1] See Illustration (*a*). This and all the other illustrations are taken from Baillie's Digest, Book VII, chap. ii. Comp. Hed. Book XXXVIII, chap. i, p 549.

[2] Baillie, Book VII, chap. vi, p. 494. Hed. 549, where the doctrine of Shafei, to the effect that a plurality of co-sharer pre-emptors take shares in the pre-empted property proportionate to their original shares, is noticed and rejected. And that contiguity gives no precedence as between participators in the same easement, see the third sentence in illustration (*a*), the principle of which was affirmed in *Karim Baksh*, 16 All., 247 (1894).

[3] See Illustration (*b*).

[4] Illustration (*c*).

[5] The principle of the last illustration was applied in *Ganeshi Lall*, 5 N. W., (1873), to a suit between Hindus governed by the custom of pre-emption. "No right of pre-emption," as explained by the last sentence, means, "no right that is available in competition with an actual co-sharer."

Where an estate, once joint, has been completely partitioned, the former co-sharers cannot set up against each other a right of pre-emption on the ground of vicinage; *Munna Lal*, 33 All., 28 (1910).

359. Pre-emption cannot be claimed on the third ground, that of mere vicinage, where the contiguous estates are of considerable extent,[1] but only as between contiguous houses and gardens. But to a claim on the ground of partnership,[2] and (probably) to a claim on the ground of common appurtenances,[3] the extent of the property is immaterial.

No pre-emption on ground of vicinage between large estates.

[1] There is no limit to the side of the property of which pre-emption is claimed by a *co-sharer*, though there is a limit in cases based on vicinage: *Sitaram Bhanrao*, 41 Bom., 636 (1917).

[2] (*Sheikh*) *Mahomed Hossein*, 6 B. L. R., 41 (1870); s.c. 14 W. R., F. B., 1; a case of partners, expressly distinguished from *Jehangir Buksh* (a case of mere neighbours), a report of which is appended to the above in a footnote, and which is reported as affirmed on review in 7 B. L. R., 24. In the former case the Court said:—

"It was urged upon us that the two lines of decision as to a neighbour and a partner cannot be reconciled; that the right was given by the Arabic texts to both in the same terms. . . . If we were to look exclusively at the language of the law as it appears in the Hedaya, there is certainly ground for this contention. But we think that we should not be justified, merely for the sake of logical consistency, in overruling what appears to have been the law consistently applied in this Court for a great number of years, and never, till very recently, questioned. . . . Moreover, the distinction does undoubtedly proceed on a very sound principle, *viz.*, that the right should be co-extensive with the inconvenience."

[3] (*Shaikh*) *Karim Buksh* v. *Kumuruddin*, 6 N. W., 379 (1874), was a case in which pre-emption was allowed in respect of a share in a *mauza* (village), and of a similar share in a *patti* (sub-division of a village); in both cases definite pieces of land were held separately by the vendor and by the pre-emptor, but there were common appurtenances in the shape of an undivided plot of land, and a few trees and tanks, which were held to bring the claimant within the second class of pre-emptors.

In *Abul Rahim Khan*, 15 All., 104 (1893), it was admitted that there were common appurtenances, consisting of a burying ground and a *chaupal*,* but the Court, nevertheless, held (without giving any reason) that the pre-emptor was "really no more than a neighbour." The real reason may have been that the common appurtenances specified were such as ordinarily belong to mere neighbours, and such that the participation therein of a stranger would cause no appreciable inconvenience.

Neighbours who cannot claim pre-emption.

360. A mere tenant of contiguous land cannot claim pre-emption[1]; nor can a mere possessor with no legal title.[2]

[1] *Gooman Singh*, 8 W. R., 437 (1887). The report does not show what kind of tenant the claimant was.

[2] *Beharee Ram*, 9 W. R., 455 (1868). Conversely, the true legal owner does not lose his right of pre-emption by the mere fact of being temporarily out of possession: *Sakina Bibi*, 10 All., 472 (1888).

Whether vendee who might pre-empt can resist pre-emption.

361. According to the Calcutta and older Allahabad rulings, where one co-sharer in an estate sells to another, a third co-sharer has no right to come in and claim pre-emption as to the whole or any part of the share so sold,[1] unless the purchasing co-sharer has associated a stranger with himself, in which case any other co-sharer or co-sharers may pre-empt against both purchasers, at all events if the share to be taken by the outsider was not clearly distinguished in the sale-deed.[2]

According to recent Allahabad rulings (based on authorities not previously brought to the notice of either High Court), even when the sole purchaser is a person who might have pre-empted in case of a sale to a stranger, other persons having a similar right of pre-emption are entitled to exercise it against him, to the same extent as if he had acquired the property by pre-emption in their absence.[3]

N.B. Whichever principle is applied between co-sharers will be applied also between "participators in appendages" or mere neighbours, provided that both disputants are pre-emptors of the same class.[4]

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* A shed, house, chabutra (platform), or verandah, in which the village community assemble for public business. It is usually, in Northern India, the public apartment of a lambardar's house.

[1] *Moheshee Lall*, 6 W. R., 250 (1866); *Teeka Dharee Singh*, 7 W. R., 260 (1867), *Lalla Nowbut Lall*, 4 Cal., 831 (1879), where Garth, C. J., remarked that according to the Hedaya the object of pre-emption was to prevent the introduction of a disagreeable stranger as a coparcener or near neighbour, and considered it "obvious that no such annoyance could result from a sale by one coparcener to another." The principle was tacitly assumed in all the Allahabad cases referred to in the next note, the only question being as to its applicability to a coparcener associated with a stranger.

[2] *Ganeshee Lal*, 2 N. W., 343 (1870); *Manna Singh*, 4 All., 252 (1881), *Saligram Singh*, 15 Cal., 224 (1887). In all these cases pre-emption was allowed against the sharer-purchaser as well as against the stranger associated with him, in spite of separate specification of the share purchased by each; but on that point *Ganeshee Lal* and *Manna Singh* were expressly dissented from in *Sheobaros Rai*, 8 All., 462 (1886)—though the Calcutta judges seem to have decided *Saligram Singh* in ignorance of that fact—and again in *Ram Nath* v. *Badri Narain*, 19 All., 148 (1896).

[3] *Amir Hasan*, 19 All., 466 (1897), followed in *Abdullah* v. *Amanat-Ullah*, 21 All., 292 (1899).

[4] In *Amir Hasan* the vendees and the pre-emptors were "participators in appendages."

362. In the case of a sale on credit the pre-emptor must make his immediate and formal demand as in other cases; but with respect to credit, he must be put in the same position as the purchaser. Cases of sale on credit.

In previous editions Sir Roland Wilson affirmed the proposition that in the matter of credit the pre-emptor was to be in a worse position than the purchaser. He had the apparent authority of Hed. 555 and Baillie 491. But the Hedaya cites also two competent authorities on the other side. It admits that Ziffer (a Hanafi authority) considered the pre-emptor entitled both to immediate possession and to the stipulated term of credit, and that this was also the opinion of Shafei: "for the respite is a modification of the price, in the same manner as if it were stipulated to be paid in coin of an inferior species, and as the pre-emptor is entitled to take the house for the price itself, he is of course also entitled to take it for the price under its modification. The argument adduced by 'us' in support of the former opinion, is that a delay or respite cannot be established but by a positive stipulation betwixt the parties; and in the present case there is not any stipulation, either betwixt the pre-emptor and the seller or betwixt the pre-emptor and the purchaser; nor can the seller's consenting to a respite in favour of the purchaser be construed into a consent to respite in favour of the pre-emptor; *for men, as they differ in their circumstances, are more or less capable of discharging their debts.*"

The argument adduced by 'us' seems specious. The giving of credit materially affects the present value of the price. It is acknowledged that the pre-emptor should pay the same price—not more and not less—than that agreed between the vendor and the purchaser. This principle would be infringed by the proposition of the Hedaya. The opinion of "Ziffer" and Shafei seems sounder, and as it is a matter of reasoning from an acknowledged principle, it is probable that the Anglo-Muhammadan Courts would follow it in preference to the reasoning of the Hedaya. The Shia view also agrees with that of Shafei and the Hanafi authority "Ziffer"; Baillie II, 190; and Querry, II, p. 279, s. 53. Mr. Justice Mahmood's definition of pre-emption also includes the

clause: "on such terms as those on which such . . . property is sold to another person;" *Gobind Dayal*, 7 All., 799 (1885). He would therefore support "Ziffer."—A.Y.A.

Pre-emptor forfeits his right by joining a stranger,

363. If a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right, he thereby forfeits his own pre-emptive right and the suit must be dismissed as against both.

Bhawani Prasad, 5 All., 197 (1882).

or by attempting to dispose of the property before decree.

363A. The object of pre-emption being to prevent the inconvenience that might arise through the intrusion of a stranger into co-ownership or close neighbourhood, the pre-emptor forfeits his right by attempting to dispose of the property before decree in a manner inconsistent with that object.[1] But the right is not forfeited by sale or mortgage of the pre-empted property after decree, even though it be before execution,[2] nor by the fact of the pre-emptor having on a previous occasion mortgaged his own share on which his right of pre-emptoin depends.[3]

[1] *Rajjo* v. *Lalman*, 5 All., 180 (1882).

[2] *Ram Sahai* v. *Gaya*, 7 All., 107 (1884), where a rather subtle distinction was drawn between selling the property which was the subject of the pre-emption decree and transferring the decree itself, so that it would have to be executed in the name of the stranger-purchaser. The latter transaction seems to have been held in an unreported case to be void, on the ground that a decree for pre-emption is purely personal. On a sale of the property the decree would be executed in the name of the original pre-emptor, who would then deliver possession in pursuance of his contract to the stranger-purchaser, who would take his chance of being evicted by some other person having a pre-emptive right.

Á fortiori, a pre-emptor who has obtained a decree does not forfeit his right by mortgaging the pre-empted property for the very purpose of raising the purchase-money, which he must tender in order to obtain possession under the decree; such a purpose being obviously not inconsistent with the general object of pre-emption; *Bela Bibi*, 24 All., 119 (1901). *Semble*, the decision would have been the same even if the pre-emptress had mortgaged the property *for this purpose* before decree, in anticipation of success.

[3] *Ujagar Lal*, 18 All., 382 (1896).

Vendee cannot plead his own contingent right in bar of a preferential right.

364. The law is unsettled as to whether the fact of the vendee being himself a person who has a contingent right of pre-emption will, or will not, debar any person having a preferential right from exercising the same against him as though he were a stranger.

In *Maharaj Singh*, 1 W. R.., 233 (1864), pre-emption was allowed on the part of a co-sharer in the same *patti* with the vendor as against a purchaser who was a shareholder in a different *patti* of the same *pattidari* village. It would therefore have been allowed *à fortiori* against a mere neighbour. *Farzand Ali*, 1 All., 272 (1879), is a decision the other way, but turned partly on the wording of a now repealed enactment.

Position of a co-sharer who has concealed his interest.

365. A secret purchase of shares in a village in the name of another (*benami* or *farzi*) does not constitute the real purchaser a co-sharer for the purpose of pre-emption, either under the Muhammadan Law or under the provisions of a *wajib-ul-arz*, so as to enable him upon the strength of the interest so acquired to defeat an otherwise unquestionable pre-emptive claim preferred by a duly recorded shareholder immediately upon his purchase of a share for the first time in his true character, without any notice, direct or constructive, of the previous concealed purchase.

Beni Shankar, 9 All., 481 (1887), at p. 483. "It appears to us that it would be unjust from many points of view to allow an otherwise unquestionable right of pre-emption to be defeated by a stranger asserting that, by subterranean proceedings and carefully prepared *incognitos*, he had been in fact a sharer in the dark for a period long enough to baffle any action to get rid at law of his unauthorised acquisitions. The act of transfer, it is true, is that which furnishes the *bonâ fide* shareholder with the occasion to claim his pre-emptive right, but it is the disclosure of that transfer, whether by way of physical seizure or of registration of the instrument of sale, that is held to afford not only the *terminus a quo*, but also the complete cause of action for the pre-emptor's suit."

Requisites of the "sale" which gives rise to pre-emption.

366. The right of pre-emption does not arise out of gift, charity, inheritance, or bequest.[1] There must be an exchange of immovable property for money or property of some kind[2]; and there must be an actual transfer of ownership from the vendor to the vendee.[3] Neither a contract to sell at a future time, nor a sale with reservation (to either vendor or vendee) of an option of repudiation,[4] nor a lease (even though in perpetuity, and however small the reserved rent) is sufficient.[5]

[1] Baillie, 471.

[2] Ib. 472, 2nd and 3rd conditions.

[3] Ib. 4th condition. In *Najm-un-nissa*, 22 All., 343 (1900), the question whether the sale was complete so as to give a right of pre-emption, while part of the price still remained to be ascertained and possession had consequently not been transferred to the purchaser, was treated as a question of pure Muhammadan Law, and the Muhammadan authorities were very carefully examined

in spite of the fact that the Muhammadan law of sale is no longer generally in force. The decision was that the sale became complete, and the right of possession arose, on possession being taken by the purchaser (after ascertainment of the price), and not before.

In a pre-emption by contract, the intention of the parties (vendor and vendee) as to the date when the bargain was to be considered as concluded, was taken to be the date of the contract itself, and the performance of the *talabs* immediately after the contracts was held not to be premature: *Sitaram Bhanrao*, 41 Bom., 636 (1917).

As to the case in which the transfer of ownership would be complete by Muhammadan Law, but is incomplete by the statute law of India for want of registration, see s. 371, *post*.

[4] See *Ohjee-oonnissa* v. *Rustam Ali*, 1 W. R., Part II, 219 (1864).

[5] *Mooroolee Ram*, 8 W. R., 106 (1867)—a case in which the rent reserved was only one rupee *per annum*; *Ram Golam Sing*, 25 W. R., 43 (1875); *Dewanutulla*, 15 Cal., 184 (1887).

The rule given in the text being merely that of pure Muhammadan Law it can of course be varied by an express condition in the *wajib-ul-arz*, as was the case in *Lalji Misr*, 33 All., 104 (1910), where it was held that the word "*intiqal*" was wide enough to include a perpetual lease. See also note 2 to sec. 368 below.

When *hiba ba shart ul iwaz* counts as sale.

367. In the case of a gift with a condition that something shall afterwards be given in return (*hiba ba shart ul iwaz*) the right of pre-emption arises when, but not before, possession has been taken on both sides.

Baillie, 471.

Mortgage counts as sale only when foreclosed.

368. In the case of a mortgage (even if it be in the form of an absolute sale defeasible on repayment) the right of pre-emption does not arise until the equity of redempson is finally foreclosed[1]; unless it be by virtue of some special provision in the local *wajib-ul-arz*.[2]

[1] *Gurdial Mundar*, B. L. R., sup. vol., 166 (1865), Bayley, J., dissenting.

[2] See, for instance, *Ashik Ali*, 5 All., 187 (1882), which shows also that a person who might have pre-empted on the occasion of a mortgage under the terms of the *wajib-ul-arz* does not lose his right by waiting till the mortgage is foreclosed. In *Suba Singh*, 39 All., 544 (1917), the term *intiqal* was construed to cover a mortgage by way of conditional sale as giving rise to a right of pre-emption, and the pre-emptor's cause of action was held to arise on the execution of the mortgage and not when a foreclosure-decree was passed or when the mortgagee obtained possession thereunder. The case of *Ashik Ali*, cited above was not referred to.

Rule as to property assigned as dower.

369. Property assigned by a husband to his wife as constituting her dower does not, but a transfer of land in satisfaction of a sum of money already due as dower does, give rise to a right of pre-emption.

Fida Ali, 5 All., 65 (1882). The correctness of the second branch of this ruling is questioned by Mr. Ameer Ali (Muhammadan Law, Vol. I, p. 590) on the ground that "the wife conveying to the husband and *vice versâ* do not thereby introduce a stranger among co-sharers and neighbours." But against this it may be urged that the general tendency of Muhammadan Matrimonial Law (differing from Hindu and English Law) is to treat husband and wife as separate personalities, united by a contractual bond for a specific purpose and that at all events, as was pointed out by the judges, "stranger" means in pre-emption law simply a person who is neither a co-sharer nor a participator in the appendages, nor a neighbour in respect of the pre-empted property. Mr. Ameer Ali's contention was expressly rejected by the Allahabad High Court in *Nathu* v. *Shadi*, 37 All., 522 (1915), following *Fida Ali's* case as above.

370. If a house is sold apart from the ground on which it stands with a view to being pulled down, so that it is in fact a sale of the materials, no right of pre-emption arises with respect to it.[1] If it is sold for occupation as a house, then pre-emption can be claimed on the ground of vicinage by the owner of any adjoining land [and *perhaps* by the owner of the site itself, supposing him to be a different person from the vendor of the house, even though he should happen to own no land except that covered by the house].[2] But the owner of the site is not, simply as such, either a co-sharer or a "participator in appendages" with the vendor of the house, so as to be able to claim pre-emption on either of those grounds.[3]

Distinctions as to house sold apart from the site.

[1] Baillie, 473, as explained by Turner, J., in *Zahur* v. *Nur Ali*, 2 All., 99 (1879).

[2] *Zahur* v. *Nur Ali*. The report states that the claim which was allowed was on the ground of vicinage, but does not state whether the pre-emptor owned the site and other adjoining land, or the site alone, or the adjoining land alone, or a house on the adjoining land, contiguous to the pre-empted house. It is stated that the vendor had no right in the land, but we are not told whether or not he was in the somewhat unusual position of being absolute owner of a house built on land belonging to another person. In the commoner case of a long building lease, no question of pre-emption could arise; see s. 366 *ante*.

[3] *Pershadi Lal*, 2 N. W., 100 (1870), not referred to in the report of *Zahur* v. *Nur Ali*, though Turner, J., who was the sole judge in the latter, was one of the judges in the earlier case. The report of the former case represents the judges as merely deciding (naturally enough), that ownership of the site did not of itself constitute the plaintiff either a partner or a "participator in the appendages" with the owner of the house; it does not state whether he also claimed on the ground of vicinage, or if not why not, or why, if he did, his claim was disallowed. Both cases are so imperfectly reported that it is impossible to say whether they are really in conflict.

371. If, under a contract of sale of immovable property, the price has been paid in whole or in part, and the purchaser has been put into possession, though the legal ownership has not been transferred by reason of the transfer not having been registered in accordance with the Transfer of Property Act, 1882, it seems that a right of pre-emption arises —at all events, if the formality of registration was intentionally omitted in order to defeat such right, and if the circumstances are such that the purchaser could have obtained the legal ownership by means of a suit for specific performance.

Registration not absolutely essential.

Janki v. *Girjadat*, 7 All., 483 (1885), by the majority of the Full Bench Mahmood, J., dissenting; and *Begam* v. *Muhammad Yakub*, 16 All., 344 (1894), where Banerji, J., dissented in part from the opinions expressed by his colleagues though he concurred in the decree, on the ground that the purchaser could have enforced specific performance, and could also have resisted an action of ejectment on the part of the seller on the ground of fraud.

The latter case was treated in *Najm-un-nissa*, 22 All., 343 (1900), as "an authority for the proposition that in considering whether a right of pre-emption arises the Muhammadan Law is to be applied, and that if there is a complete sale under that law, although not under the general law, the right of pre-emption will arise." And this proposition is now apparently settled law, at least within the Allahabad jurisdiction, though to the present writer, as to Justices Mahmood and Banerji, and to the Calcutta High Court in *Jadu Sahu*, 35 Cal., 575 (1908), at p. 599, and again in *Budhai Sardar*, 41 Cal. , 943 (1914), at p. 949, its soundness seems open to question. For inasmuch as the general law (embodied in s. 54 of the Transfer of Property Act) confessedly supersedes the Muhammadan Law of sale on the question of what is necessary in order to transfer the ownership of immovable property to the purchaser, while the Muhammadan Law itself requires that for the purpose of pre-emption there should be an entire cessation of ownership on the part of the seller (Baillie, 472), it would seem that we are defeating rather than giving effect to that law in the sphere in which we profess to preserve it, if we insist on ignoring a legislative change outside that sphere which has altered the legal procedure for transferring ownership. Nor is the objection, that we are arbitrarily attaching to a mere contract for sale an incident which the Muhammadan lawyers intended to attach only to an actual sale, effectually met by the specific performance test suggested by Banerji, J.; still less by the solution incidentally suggested in *Jadu Sahu*, that the Court should look in each case to the intention of the parties (*i.e.* of vendor and vendee). Why should the right of a third party, the pre-emptor, depend on his ability to divine what they meant as between themselves by omitting to register? The only safeguard really needed against the so-called fraudulent device is to let it be understood that the right of pre-emption is not forfeited by delaying its assertion until the title of the vendee has been completed by registration. The latter will scarcely care to part with his money in exchange for a precarious unmarketable possession, destined to pass from him to the pre-emptor the moment he attempts to make it secure.

The Calcutta view has been adopted by the Patna High Court *per* Mullick, J., in *Kheyali Prasad*, 1 Patna L. J. 174 (1916), though Justice Roe in his judgment tried to reconcile the Allahabad and the Calcutta rulings by framing the test question in this form: "was the sale *in the eyes of the parties* (including the pre-emptor) complete?"

Where possession is not given and the price is not paid till registration, the right of pre-emption arises upon registration and not before : *Budhai Sardar*, 41 Cal., 943 (1914), *per* Richardson, J.

372. Every suit for pre-emption must include the whole of the property which, being subject to the plaintiff's right of pre-emption, has been conveyed by one bargain of sale to one stranger. What the claim must include.

Durga Prasad v. *Munsi*, 6 All., 423 (1884), where also the Calcutta authorities are referred to. " The right of pre-emption owes its origin to the policy that the introduction of a stranger into an estate will not be conducive to peace, but will disturb the quiet enjoyment of their rights by the co-sharers of the vendor. Now, if a pre-emptor objects to the introduction of a stranger, he must necessarily object to his introduction, on principle, as a proprietor of any part of the estate, or he must not object at all." . . ." The plaintiffs do not complain of the intrusion of a stranger, but they wish to oust him only from so much of the land as they choose to pre-empt. The right of pre-emption was never intended to confer such a capricious choice upon the pre-emptor " (*per* Mahmood, J., at pp. 425, 426).

373. If the pre-emptor's right, or preferential right, applies only to a part of the property comprised in the contract of sale, while with respect to the remainder he is either, equally with the vendee, an entire stranger, or his right of pre-emption is inferior to that of the vendee, he may claim the part with reference to which he has the sole or preferential right on tendering a proportionate part of the purchase-money. Not necessarily all the land sold.

Illustration.

The wajib-ul-arz of a village contained this clause regarding the transfer of shares by sale or mortgage, *viz.* "Whenever a shareholder intends to transfer his rights, his nearest co-sharer shall be entitled to purchase the same, and on his refusal the other sharers in the *thoke*, * and on their refusal sharers in other *thokes*, will be entitled." A, the proprietor of a four-pies' share in one *thoke*, and of a nine-pies' share in another *thoke*, sold both, together with a bungalow, garden, and factory situated on the land comprised in the four-pies' share, for Rs. 10,000 to B and others, shareholders in the *thoke* containing the nine-pies' share. C and others, shareholders in the *thoke* containing the four-pies' share, sued as pre-emptors to obtain possession of that share and the bungalow, garden and factory, on payment of four-thirteenths of that sum. It was held that they were entitled to have the four-pies' share of the land, without the bungalow, garden, and factory, and without the nine-pies' share of the other land, and that the value of the several properties must, for the purpose of working out the decree, be separately ascertained.

Saligram v. *Debi Pershad*, 7 N. W., 38 (1874). The exclusion of the bungalow, etc., depended on no principle of Muhammadan Law, but on the construction put by the Court upon the local *wajib-ul-arz*

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* A *thoke* is a subdivision of a coparcenary village, related differently in different district to a *patti*.—Wilson's Glossary.

But all that the pre-emptor might have claimed except for his own act or default.

374. If a person, who had at the time of the sale a right of pre-emption over the whole of the property sold, has disentitled himself by his own act or laches for exercising that right in respect of one part of the property, he cannot then maintain his suit in respect of the other part, even if he is willing to pay the whole purchase-money and to leave in the vendee's hands the portion as to which he is disqualified.

Illustration.

A person sold to a stranger, by one contract and for one price, (*a*)his share in a certain village, the shareholders of which were governed by a local wajib-ul-arz, and (*b*) a piece of land in the adjoining city. The plaintiff was a shareholder in the village, and had also a right of pre-emption under the general Muhammadan Law in respect of the city land. The plaintiff having failed to prove that he made the prompt demand required by the Muhammadan Law for the city land, it was held that he had forfeited his right of pre-emption as to the village land also, even though he should be able to prove that he had satisfied the conditions of the wajib-ul-arz, and even though he should be willing to take the village land at the price of the whole property sold.

Muhammad Wilayat, 11 All., 108 (1888), followed in *Mujib ullah*, 21 All., 119 (1898).

PROCEDURE IN EXERCISING THE RIGHT.

Formalities.

375. It is necessary to the validity of a claim of pre-emption—

(1) That the pre-emptor should make known in some way his intention to make it immediately on hearing of the sale (*talab-i-mowasibat**);[1]

(2) That he should with the least practicable delay make a formal declaration to the same effect before witnesses (*istish-hád* or *talab-i-ish-hád*), in presence of either vendor or vendee, or on the premises;[2]

(3) That he should enforce his claim, if not voluntarily conceded, by regular suit (*talab-i-khusúmat* or *talab-i-tamlík*) brought against the vendee within the period prescribed by the Limitation Act.[3]

[1] *Jarfan Khan*, 10 Cal., 383 (1884), purporting to give effect to the following passage of Baillie's Digest, p. 481. "When a person who is entitled to pre-emption has heard of a sale, he ought to claim his right immediately on the

* Literally, the demand of jumping. The same noun is used of a poet plunging *in medias res*; but here the idea is rather of a person jumping from his seat, as though startled by the news of the sale. Nauphal, i, 72.

instant (whether there is any one by him or not), and when he remains silent without claiming the right, it is lost . . . According to the Hedayah, if a pre-emptor receives the information of a sale by letter, and the information is contained in the beginning or middle of the letter, and he reads on to the end without making his claim, the right is lost." The reference is to Hed. Book XXXVIII, chap. ii, p. 500, where the words quoted will be found to be very materially qualified by the sequel which the Fatawa Alamgiri omits: "Many of our doctors accord in this opinion, and it is in one place recorded as the doctrine of Mohammed. In another place, however, it is reported from him, that if the man claim his Shaffa in the presence of the company among whom he may be sitting when he receives the intelligence, he is the Shafee, his right not being invalidated unless he delay asserting it until after the company have broken up. Both these opinions are mentioned in the Nawadir; Koorokhee passed decrees agreeably to the last quoted report, because, the power of accepting or rejecting the Shaffa being established, a short time should necessarily be allowed for reflection; in the same manner as time is allowed to a woman to whom her husband has given the power of choosing to be divorced or not. The opinion last quoted is presumably that preferred by the writer of the Hedaya, and it certainly seems the more reasonable one.

Accordingly in *Amjad Hossein*, 4 B. L. R.. A. C., 203 (1870), it was held that the pre-emptor's right is not invalidated by the fact of the pre-emptor taking a short time (not stated how long) before performance of the *talab-i-mowasibat* for ascertaining whether the information conveyed to him was correct or not, provided the demand is made immediately after he has ascertained that the sale has been already made; but in *Ali Muhammad* v. *Taj Muhammad*, 1 All., 283 (1878), a delay of twelve hours was held to be too long. And in *Ram Charan*, 4 B. L. R., A. C., 216 (1870), the pre-emptor was held to have forfeited his right by going straight to the land in dispute and there making his first claim. In this and some other cases, stress was laid on the remark found in the Hedaya (p. 550), that "the right of Shaffa is but a feeble right, as it is the disseising of another of his property merely in order to prevent apprehended inconveniences," and the general tendency of our Courts, in the interest of free alienation and free contract, has been to restrict the right of pre-emption within the narrowest limits, and to insist on the most literal fulfilment of the formal requirements of the Shariat. See, for instance, *Hosseinee Khanum*, 1 W. R., Part II. (1864). "We must look upon these preliminaries, not as mere matters of form, but as the immediate expressions of a (perhaps) pre-existent desire to become owner of the particular property, arising out of those circumstances of necessity or convenience which the Muhammadan Law recognises as giving birth to the right."

This particular requirement is traced to an alleged saying of the Prophet "the right of Shaffa is established in him who prefers his claim without delay." Its underlying principle is identical with that of the Roman rule barring the *actio injuriarum* where no resentment appeared to have been displayed by the sufferer at the time of receiving the blow or insult (Inst. iv, 4, 12). Here the ground of the claim is the annoyance generally to be apprehended from the intrusion of a stranger among a body of long-established neighbours who would usually be kinsmen; and it is supposed that this annoyance can, in fact, have had no existence in the particular case, and that the subsequent claim of pre-emption must be attributable to other and less legitimate motives, if the announcement of such intrusion as imminent provoked no immediate protest.

Any words will do which, by themselves or as explained by accompanying acts, manifest an intention to exercise the right, as distinguished from a mere assertion that the right exists, *Chakauri Devi*, 28 All., 590 (1905); *Muhammed Nazir Khan*, 34 All., 53 (1911), citing and distinguishing *Muhammad Abdul Rahman Khan*, 8 A. L. J., 270 (1903), where the mere words, "I am the pre-emptor and my right extends to the land," were held to be insufficient.

"*Immediately on hearing of the sale*"; that is, immediately on hearing that the vendor has gone so far in ratifying the contract that he cannot legally draw back; *Nubee Buksh*, 22 W. R., 4 (1874) The mere receipt of information that negotiations for sale are going on will not be sufficient ground for the assertion of the right of pre-emption, *Jadu Lal Sahu*, 35 Cal., 575 (1908). The fact of the pre-emptor having refused to purchase when the offer was made to him *before* the completion of the sale to another will not prevent him from claiming immediately after completion; *Abadi Begam*, 1 All., 521 (1877). The last-mentioned case also decides that the *talab-i-mowasibat* may be made through an agent, and was followed on that point in *Munna Khan*, 28 All., 691 (1906).

[2] *Goluck Ram Deb* v. *Brindabun*, 14 W. R., 265 (1870); Baillie, 483 That a *talab-i-ish-hád* made in presence of the vendee is effectual, whether or not made on the premises, and whether or not the vendee had obtained possession, is plainly stated in Baillie, and it was so decided by the Calcutta High Court, not for the first time, in *Janger Mahomed*, 5 Cal., 509 (1879), and by the Allahabad High Court in *Ali Muhammad Khan* v. *Muhammad Said Husain*, 18 All., 309 (1896). As to the degree of promptitude required for this second and more formal declaration, it is said (Baillie, 484). that "when a pre-emptor receives intelligence of a sale during the night, and is unable to go out and call upon witnesses to attest his demand, but does so as soon as it is morning, the demand is valid. But he should go out and make his demand in the morning as soon as people are stirring about their usual avocations"; see *Jumeelun* v. *Latif Hossein*, 16 W. R., F. B., 13 (1871); s.c. as *Jamilan* v. *Latif Hossain* in 8 B. L. R., 160; also *Baijnath Ram Goenka*, 35 Cal., 402 (1908). A delay over Sunday (by a European manager) was held not fatal.

Baillie's next paragraph shows that the *talab-i-mowasibat* and the *talab-i-ish-hád* may be combined in one transaction, if it so happens that witnesses are present at the moment when the first notice of the sale reached him. And this has been expressly approved by the Allahabad High Court: *Nathu* v. *Shadi*, 37 All., 522 (1915). If, it was held, at the first demand, the pre-emptor has an opportunity of invoking witnesses, in the presence of the seller or the purchaser or on the premises, to attest the immediate demand, that would suffice for both demands, and there would be no necessity for the second demand. But the delay involved in going out to find witnesses for the *talab-i-ish-hád* will prevent that ceremony from doing duty also for the *talab-i mowasibat*, and will be fatal to the pre-emptor's claim if he cannot show performance of the first ceremony on the instant. This was in effect what happened in *Jarfan Khan's* case, above referred to. When plaintiff came home, he was told by his wife that the land in question had been sold; whereupon *without saying anything to his wife*, he went to his chest, took out the sum required, called the witnesses, proceeded first to the premises sold, where he found the purchaser and tendered the money, crying aloud that he had the right of pre-emption, and meant to exercise it, and then, on the money being refused, proceeded to the house of the vendor and made an equally formal declaration to him. This was a very complete *talab-i-is-hád*, but it would not supply the place of *talab-i-mowasibat*. On the other hand, in *Jadunundun Singh*, 10 Cal., 581 (1884), the plaintiff failed for the converse reason, because, though he called out immediately on hearing of the sale, "It is my right, I have purchased," and called upon the person present to bear witness to the fact, this first *talab* did not take place in the presence of either vendor or purchase, or on the purchased premises, and therefore could not supply the lack of evidence as to proper performance of the second *talab*. See also *Razeeooddeen*, 8 W. R., 463 (1867), and *Jhotee Singh*, 10 W. R. 119 (1868), in which the Court expressly negatived the notion that "the *tulub-i-istishuhud* (*sic*) is a second preliminary only necessary to be performed to prove the essential preliminary of *talab-i-mowasibat*, and is not required if the latter can be established without it. . . The declaration of intention

to assert the right, and the actual demand, are two overt acts on the part of the claimant. Generally the occasions which call for these respectively would be different, and neither of them can be dispensed with." And see *Ganga Prasad*, 28 All., 24 (1905).

As to what is a demand "on the premises," in respect of a share in an undivided village, see *Kulsum Bibi*, 18 All., 298 (1896), and *Muhammad Usman*, 34 All., 1 (1911). In the first case it was held that a demand made in the village a fractional share of which had been sold, was a good demand "on the premises." In the second case the declaration was made on the plaintiff's own *chabutra*, in the *abadi* which was the common property of the proprietors of the mahal; it was held that this was a good demand "on the premises."

[3] Baillie, 484. "By the *tulub-tumleek*, or demand of possession, is meant the bringing the matter before the judge that he may decree the property to the claimant by virtue of his right of pre-emption." As to the time within which this demand should be made, see below, s. 380.

The expression *talab-i-khusumat*, demand of contest, is that given in Wilson's Glossary.

It is said in the Hedaya (p. 553) that the suit may be instituted in the first instance against the seller if he happens to be still in possession, but even then the purchaser must be present (or, as we should say, must be made a party to the suit) before the decree is passed.

376. In making the *talab-i-ish-hád*, or formal demand before witnesses, it is necessary to refer expressly to the fact of the immediate claim (*talab-i-mowasibat*) having been duly made.

First demand must be referred to in making the second.

The contrary was held in one case, *Nundo Pershad*, 10 Cal., 1008 (1884); but this decision was expressly overruled by the Full Bench in *Rujjub Ali*, 17 Cal. 543 (1890); and the latter decision has been followed by the Allahabad High Court in *Akbar Husain*, 16 All., 383 (1894); *Abbasi Begam*, 20 All., 457 (1898); *Abid Husen*, 20 All., 499 (1898), and *Mubarak Husain*, 27 All., 163 (1904). The Patna High Court has held that a petition to the Sub-Registrar at the Registration Office, that the registration might be stayed, making no reference to any *talab-i-mowasibat*, was not a sufficient compliance with the requirements of the Muhammadan Law in the matter of the two *talabs*. The chief passage on which the questions turns is the following of the Hedaya (p. 556): "Such a person has bought such a house, of which I am the Shafee (pre-emptor); *I have already claimed my privilege of Shaffa, and now again claim it;* be therefore witness thereof." The corresponding passage of the Fatawa Alamgiri, as paraphrased by Baillie (p. 483), goes a little further, and supports still more strongly the view that has ultimately prevailed: "By *talab-ish-hád* is meant a person calling on witnesses to attest his *talab-Moowathubut*, or immediate demand." The view taken of these authorities by the judges who decided *Nundo Pershad's* case was in effect that the object of the requirement was to meet the case of there having been no witnesses to the first assertion of claims, in which case the pre-emptor's subsequent declaration before witnesses that he had asserted his claim immediately on hearing (or reading) of the sale would be accepted as sufficient; consequently that the requirement might be dispensed with where, as in the case before them, the pre-emptor had made his first assertion before competent witnesses, and had then repeated it, after a very short interval, in presence of those same witnesses, and in presence of the vendor, or of the purchaser, or both. It seemed to these judges "unnecessary that the plaintiff should go through the empty form of reminding these

witnesses of what they had just heard." The same feature, however, was found in *Rujjub Ali's* case, but, nevertheless, on reference to the Full Bench it was held that the authorities were clear, and must be strictly followed. There is, in truth, an obvious flaw in the reasoning of the former judges, namely, that the persons who require the information as to the immediate claim having been made are not the witnesses, but the vendor or purchaser (as the case may be) against whom the claim is made. Moreover, the suggestion that the rule was intended to meet the contingency of the pre-emptor having no witness at hand when he first becomes aware of the sale, would only be admissible if such a contingency were a common or likely one, whereas it would have been to the old Muhammadan lawyers hardly conceivable. In the absence of newspapers and of the penny post, how should a man become aware of a sale in which he is interested except by verbal report or letter delivered by hand, and what is to prevent his calling the reporter or messenger to witness his protest ?

Talab-i-ish-hád may be made by letter, etc.

377. If the pre-emptor is at a distance, and cannot personally perform the *talab-i-ish-hád*, he may depute an agent for the purpose ; failing an agent, he may write a letter appointing an agent.

The Allahabad High Court, in their latest ruling, *Muhammad Khalil*, 38 All., 201 (1916), left it doubtful whether they would consider a simple letter direct to the vendor or vendee (not appointing an agent) valid in any circumstances. The earlier rulings were more liberal, and it is submitted, more in consonance with modern conditions of life, for they allowed a pre-emptor to make his second demand by agent, messenger or letter, if he could not do so, personally. See *Wajid Ali Khan*, 4 B. L. R. A. C. 139 (1870) ; *Jadu Singh*, 4 B. L. R., A. C., 171 (1870) ; *Imamuddin*, 6 B. L. R., 167, note ; *Abadi Begam*, 1 All., 521 (1877) ; *Ali Muhammad Khan* v. *Muhammad Said Husain*, 18 All., 309 (1896). In *Sitaram Bhanrao*, 41 Bom., 636 (1917) it was tacitly assumed that the second demand performed by the pre-emptor's attorney by letter was valid although there was no question of distance : what an attorney could do by letter, the principal should also be able to do.

A guardian or manager under the Court of Wards may, and should, perform the ceremonies of pre-emption on behalf of an adult female Ward of Court, if in his opinion it is for her benefit ; *Jadu Lal Sahu*, 35 Cal., 575 (1908), at p. 605.

Act or omission of agent.

378. Any act or omission on the part of a duly authorised agent or manager of the pre-emptor has the same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself.

Harihar Dat, 7 All., 41 (1884).

Price need not be then and there tendered.

379. It is not necessary that the pre-emptor should tender the price at the time of making his formal claim. It is sufficient that he should then state his willingness to pay either the price named in the sale-deed, or, if he suspects the price named to be fictitious, such a sum as the Court may award.

Khoffeh Jan Bebee, 10 W. R., 211 (1868); *Heera Lall*, 11 W. R., 275 (1869); *Nundo Pershad*, 10 Cal., 1008 (1884), at p. 1018; *Lajja Prasad* v. *Debi Prasad*, 3 All., 236 (1881); *Karim Baksh* v. *Khuda Baksh*, 16 All., 247 (1894).

380. A suit to enforce a right of pre-emption, whether the right is founded on law, or general usage, or special contract, must be instituted within one year from the time when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered. Limitation.

Limitation Act, 1908, Schedule I, 10. This enactment supersedes the Muhammadan Law on the subject, as to which see Baillie, 484, 485. As between the conflicting opinions there noted, our Courts had previously given the preference to that which allowed unlimited delay after the *talab-i-ish-hád* had been once duly performed. See Macnaghten, pp. 48, 187, and footnotes.

Where a suit for pre-emption was instituted on the very last day allowed by the Limitation Act (the preliminary demands having been made in proper time), but the plaint was subsequently amended in order to correct a mistake as to the quantity of land sold, it was held that the suit did not thereby become time-barred; *Muhammad Sadiq*, 33 All., 616 (1911).

380A. The vendor is not a necessary party to a suit for pre-emption.

Harbans Tiwari, 32 All., 14 (1909), and cases there cited.

381. (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property, and the purchase-money has not been paid into Court, the decree shall— Decrees in pre-emption suits.

(*a*) Specify a day on or before which the purchase-money shall be so paid, and

(*b*) Direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (*a*), the defendant shall deliver possession of the property to the plaintiff, *whose title thereto shall be deemed to have accrued from the date of such payment*, but that, if the purchase-money and costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct

(*a*) If and so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

(*b*) If and so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

Civil Procedure Code, 1908, First Schedule, Order XX, Rule 14; substituted for s. 214 of the Code of 1882. The words italicised in sub-rule (1) (*b*), and the whole of sub-rule (2), are new. Presumably it had been found necessary or convenient in some cases to include in the decree a contingent sanction of the claim of an inferior pre-emptor, in view of the possibility of the superior pre-emptor making default.

Money paid into Court under this section is no longer the money of the pre-emptor, consequently is not liable to be attached by his creditors, *Abdus Salam*, 19 All., 256 (1897).

The property of which possession is decreed must be taken subject to any incumbrance to which it was subject when purchased by the vendees; *Tejpal* v. *Girdhari Lal*, 30 All., 130 (1908).

The sum decreed need not be paid pending an appeal.

382. If the plaintiff intends to appeal against the decree in respect of any condition thereby imposed upon him, he is not bound to pay the purchase-money in the meantime, and is not debarred from presenting his appeal after the time fixed for such payment.

Kodai Singh, 13 All., 376 (1890); *Wazir Khan*, 16 All., 126 (1893). In the former case the condition appealed against was the amount of the purchase-money decreed; in the latter case the question was whether the money should be paid direct to the vendees or be applied in discharge of a mortgage-debt.

Effect of compromise.

383. If a pre-emptor enters into a compromise with the vendee, or takes any benefit from him in respect of the property, he by so doing is taken to have acquiesced in the sale, and to have relinquished his pre-emptive right.

Habib-un-nissa v. *Barkat*, 8 All., 275 (1886), following Baillie, 499; but an offer to purchase from the vendee at the sale-price, made by the pre-emptor as such in order to avoid litigation, does not amount to a waiver of his right; *Muhammad Nasir-ud-din*, 16 All., 300 (1894), followed in *Muhammad Yunus Khan*, 19 All., 334 (1897).

384. The pre-emptor cannot excuse himself for delay in making his claim after receiving notice of the sale, by pleading that he had reason to believe the real price to be much lower than that notified to him. He should in that case announce at once his willingness to purchase at the lower price, and if he neglects to do so he is deemed to have waived his right of pre-emption.[1] But a person who refrains from pre-empting when he first hears of the sale, owing to being misinformed as to the price, is not estopped from reviving his right on becoming subsequently aware of the true price.[2]

Course to be taken by pre-emptor who suspects the price named to be fictitious.

[1] *Bhairom Singh* v. *Lalman*, 7 All., 23 (1884). As a matter of fact, the notice on which the Court laid stress, as that on which the plaintiff ought to have acted, and by ignoring which they apparently considered him to have been estopped, was not a notice of a completed, but of an intended sale. If and so far as this was the ground of decision, it conflicts with an earlier decision of the same Court (see under s. 375, *ante*), and was expressly disapproved by Mahmood J., in *Thamman Singh*, 7 All., 442 (1885). But as the report shows that the sale-deed was engrossed the very day after the notice, and registered a fortnight later, it is pretty certain that the plaintiff had practically notice of the completed transaction long before he took any step to assert his claim, so that the case is good authority for the proposition in the text.

[2] *Abadi Begam*, 1 All., 521 (1877).

MISCELLANEOUS.

385. If the pre-emptor dies in the interval between the sale which gave rise to the right of pre-emption and the perfecting of his title by surrender of possession or judicial decree, the right is extinguished altogether, and cannot be exercised by his heirs. This rule is not accepted by the Bombay High Court, but has been applied by the Allahabad High Court subject to certain limitations.

When death of pre-emptor extinguishes the right.

Baillie, 499, 502; Hed. Book XXXVIII, chap. iv, p. 561. "The argument of our doctors upon the point is that the death of the Shafee extinguished his right in the property from which he derived his privilege of Shaffa, and the property did not devolve to his heirs until after the sale." This rule was followed

in *Muhammad Husain*, 20 All., 88 (1897); but it is not one of the rules which the Courts have considered themselves bound to apply by analogy to cases arising under a local *wajib-ul-arz* which happens to be silent on the point; *Wajid Ali* v. *Shaban*, 31 All. 623 (1909), already referred to under s. 354. And in *Sayyad Jiaul Hussan Khan*, 36 Bom., 144 (1911), though pre-emption was claimed under the Muhammadan Law, the Court held that law to be superseded by s. 89 of the Probate and Administration Act, 1881,* on the plaintiff taking out letters of administration under that Act. In *Sitaram Bhanrao*, 41 Bom., 636 (1917), the pre-emption was decreed to an Administrator; though the decree was based on the vendees' recognition of pre-emption in his contract, the doctrine of the *Talabs* was applied; and conveyance in virtue of pre-emption to an Administrator under sec. 9, Probate and Administration Act, 1881, was held to be reasonable, as adding to the estate of the deceased. This point does not seem to have been raised in the Allahabad case; nor, on the other hand, was that case brought to the notice of the Bombay Court.

Case of pre-emptor being under disability.

386. If the person entitled to pre-emption happens to be a minor or a lunatic at the date of the sale, his guardian (or committee) may exercise the right on his behalf, and ought to do so if he considers it to be for his advantage.

If he does not do so the claim is barred altogether, and cannot be set up afterwards by the minor on coming of age, or by the lunatic on recovering his reason.

Hed. 564.

Vendor not bound to give notice, unless by local custom.

387. It is not necessary according to Muhammadan Law, but it is sometimes required by the local *wajib-ul-arz*, that the owner of property should give notice to the persons having the right of pre-emption before selling to a stranger. Under the Muhammadan Law the right cannot be lost by delay in making the demand until the existence of a binding contract has actually come to the knowledge of the pre-emptor; where notice is required by the *wajib-ul-arz* the right is lost unless the pre-emptor replies to the notice within a reasonable time after receiving it, offering to purchase at the price asked, or at a price to be settled in accordance with the provisions of the *wajib-ul-arz*.

See *Muhammad Wilayat*, 11 All., 108 (1888), where part of the land claimed was governed by such a *wajib-ul-arz*, and the remainder by the general Muhammadan Law.

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* See the note under s. 176 of this Digest.

388. Acquiescence in a mortgage by conditional sale does not imply the foregoing of the right to pre-empt, should the conditional sale eventually become absolute.

Case of conditional sale becoming absolute.

Ajaib Nath, 11 All., 164 (1888).

389. The proprietary title of the pre-emptor is complete when, and not before, he has either taken possession with the vendee's consent, or tendered the purchase-money in accordance with such a decree as is mentioned in s. 381 of this Digest. The vendee is entitled to retain any fruits gathered by him before the pre-emptor's title has been thus perfected,[1] and if the decree is varied by the alteration on appeal, of the price, he is also entitled to the profits for the period the pre-emptor was in possession under the original decree; the pre-emptor's title being only perfected when he pays [or tenders] the price under the *final* decree.[2]

Pre-emptor's ownership dates only from his taking possession.

[1] *Deokinandan*, 12 All., 234 (1889). Mahmood, J., thought that the vendee was entitled to the profits up to the time when the pre-emptor actually obtained possession, but the other three judges of the Full Bench thought not. The view of Mahmud, J. has, however, been approved by the Privy Council in *Deonandan Prasad Singh*, L. R., 44 Ind. App., 80 (1916) at p. 85.

The main principle, as to which all four were agreed, had already been laid down though with reference to a somewhat peculiar state of facts, in *Deo Dat* v. *Ram Autar*, 8 All., 502 (1886), following two North-West decisions, *Manik Chand*, 2 N.W. P. (S. D. A.), 171 (1865), and *Baldeo Pershad* v. *Mohun*, 1 Agra, Rev. Ap. 30 (1866), and one Calcutta decision, *Sowdaghur* v. *Abdul Soobhun*, 7 W. R., 117 (1867), and dissenting from one very old Calcutta case, *Uodan Singh* v. *Muneri*, 2 Cal. S. D. A. 85; 1 Morley, 537 (1813).

For the ancient authorities, see the judgment of Mahmood, J., 12 All., 243-253. The chief text accessible to English readers is Hed. 550, the last paragraph of the first chapter of Book XXXVIII.

[2] The right to mesne profits vests in the pre-emptor from the date when he pays the amount of the purchase-money *finally* decreed. Where, under a Subordinate Judge's decree, the pre-emptors were in possession from 1900 to 1904; but the High Court reversed the decree, and the original purchaser regained possession; and on a further appeal, the Privy Council in 1908 found for the pre-emptor but fixed a higher price than the Subordinate Judge; and the pre-emptors paid the additional price and obtained possession in 1909; *held* that the original purchaser was entitled to mesne profits between 1900 and 1904, and that the pre-emptors were not entitled to mesne profits, between 1904 and 1909. *Deonandan Prasad Singh*, L. R., 44 I. A. 80 (1916).

390. The right to claim pre-emption is not affected by any intermediate dealings with the property. The proceedings must in any case be taken against the original purchaser, but when a decree has been obtained against him it

Intermediate transfers do not affect the pre-emptor.

can be enforced against any person deriving title from him by purchase, gift, inheritance, or otherwise.

See Baillie, 497. "If the purchaser disposes of the purchased mansion before it is taken by the pre-emptor, as, for instance, by gift and delivery, or by letting it to hire, or converting it into a *musjid*, and allowing people to worship in it, or into a cemetery and burying in it, the pre-emptor may take the premises and cancel all those acts of disposal by the purchaser. But it is proper to observe that all a purchaser's acts of disposal with respect to a mansion claimed under a right of pre-emption are valid until the judge's order in favour of the pre-emptor." Accordingly in *Kamta Prasad*, 32 All., 45 (1909), where the vendors had, after the sale, but before the claim of pre-emption, taken a mortgage of the land in question from their own vendees, it was held that the pre-emptor was entitled to take the property free of the mortgage.

Subsequent abatement of price.

390A. If, after the completion of the contract, the seller agrees to an abatement of the price, the pre-emptor may claim the benefit of this abatement.

Hed. 555, where it is noted that if the price be entirely remitted, the transaction ceases to be a sale, and the pre-emptor loses his right.

Device for evading pre-emption.

391. The pre-emption right of a neighbour, though not that of a co-sharer or participator in the appendages, may be defeated by the vendor reserving to himself a strip, however narrow, of the land or house as the case may be, contiguous to that owned by the neighbour in question.[1] But it cannot be defeated by dressing up a sale in the garb of a lease.[2]

[1] Macn. p. 49; Hed. 563; Baillie, 505, where it appears as the last in a list of six permitted devices. It is, however, the only one that I have ventured to set down as sanctioned by Anglo-Muhammadan Law, because it is the only one which does not involve any representation of the transaction as different from what it really is. If, for instance, the trees, with the ground immediately supporting them, are first sold separately from the rest of the land, at a price which it could not possibly be worth the pre-emptor's while to offer, on the understanding that when the purchaser has thereby become a partner, and thus able to defy the pre-emptor, the remainder will be sold at a low price; or if the price be fixed ostensibly at a thousand rupees, and then some article worth only a hundred rupees, the real price secretly agreed upon, is accepted in lieu of the purchase-money, it seems pretty clear that a British Civil Court would consider itself bound to let in evidence of the real nature of the transaction, and to decide accordingly.* There may be some doubt about the second device in Baillie's list, which consists in making a free gift of a narrow strip of the house,

* As Mahmood, J., remarked in *Gobind Dayal*, 7 All., 775 (1885), at p. 812, the question whether there has been a *bonâ fide* sale or not is not a question of substantive law, but a mere question of fact, to be ascertained by the rules of evidence, and the Muhammadan Law of evidence is certainly not now the law of British India, whatever it may have been before the passing of the Indian Evidence Act.

marked off from the rest with a line, with its right of way (through the remainder of the house ?) thereby enabling the donee, as a " participator in the appendages," to purchase the remainder of the house without fear of pre-emption from any mere neighbour. In the Hedaya, p. 563, it is put much more simply: " It is the same (as on the reservation of the strip by the seller to himself) if the seller grant the intervening part of his house as a free gift to the purchaser, and put him in possession of it."

[2] *Muhammad Niaz Khan*, 40 All. 322 (1918).

391A. The burden of proof is *primâ facie* on the pre-emptor to show that the property has in fact been sold below the stated price ; but very slight evidence is ordinarily sufficient to establish his case, and when such case is established it rests upon the defendants, the vendor and vendee, to prove by expert evidence that the stated price is the correct one.

Bhagwan Singh, 5 All., 185 (1882), followed in *Abdul Majid*, 29 All., 618 (1907). The principle governing such cases is that of s. 106 of the Indian Evidence Act, *q.v.*

PART V.—SYSTEMS OTHER THAN THE HANAFI WHICH HAVE SOME DEGREE OF IMPORTANCE IN BRITISH INDIA.

CHAPTER XIII.

PECULIARITIES OF THE SHAFEI SCHOOL OF SUNNI MUHAMMADANS, ON POINTS WITHIN THE SPHERE OF ANGLO-MUHAMMADAN LAW.

Until recently the adherents of this school attracted but little notice in India, except along the south-west coast, where they have always pre-dominated. But we are now told, by a writer who should be a most competent witness on such a point, that the doctrines of Shafei have lately made great progress among Indian Mussulmans generally, and that his followers are now to be found among all ranks of society. We are also told (what is very curious, considering that the original *raison d'être* of the school was in opposition to the comparatively progressive tendencies of Hanafism) that "Shafeism seems to have shaken off its ancient fetters, and now stands forth in the presence of the Sunnis as the embodiment of those aspirations for moral regeneration and legal reform which are agitating so many minds in India." . . . "Under the name of Rafaæddinism it is measuring strength with Hanafism in its very strongholds." (Ameer Ali M. L.Vol. I, pp. 22, 26; Vol. II, p. 15). Conversely, Van Den Berg tells us that the Hanafi doctrines have lately begun to spread in the Dutch Indies, where Shafeism has hitherto been dominant.

The fact is that both in India and elsewhere the Hanafi and Shafei schools have recently taken more and more note of each other's views, and used the increasing facilities now available for their study. As they are both orthodox and valid, their differences have been canvassed without prejudice, and sometimes with a conscious desire to develop legal ideas in harmony with modern conditions. Such a development accords better with a synthesis of friendly systems than with a single stereotyped system. The examples of mawardi and Ghazzali also show that the shafei school devoted much attention to speculations about the ideal state and general questions of social organization as based on the law of Islam. They have therefore a very living interest for ages long removed from their own.

The contents of this chapter are derived partly from the Hedaya, which frequently notes the points in which Shafei differs from "our doctors," and the arguments on both sides, but chiefly from Van Den Berg's French translations of the Fath ul Qarib and the Minhaj at Talibin.

The Fath ul Qarib by Ibn Qasim al Ghazzi, *circa* 1572 A.D., is an annotated edition of a far more ancient work, dating from near the commencement of the 12th century. The original source of all Shafei doctrine is the Kitab-ul-Umm by Shafei himself (*circa* 820 A.D.). This was supposed to be abridged in the Mukhtasar of Muzani (*circa* 878 A.D.), but this grew to be an independent work

with commentaries of its own. M. Clavel, in his "Droit Musulman" takes the Mokhtasar for his guide whenever he has occasion to speak of Shafeite law.

The Minhaj at Talibin (Guide of the earnest inquirers), by An Nawawi (died A.D. 1278), dates from the 13th century of the Christian era, and is described as an abridgment, or rather paraphrase, of a not very much earlier work called the Moharrar. Both translations were published, together with the originals, by order of the Dutch Government for the use of its officers in the island of Java.

Frequent mention is made in the course of that work of differences between the earlier and later teachings of the Master, and we are probably meant to understand, though it is not expressly stated, that the opinions formed by him after his visits to Bagdad and during his residence in Egypt are those generally followed at the present time.

Another valuable modern work on the Shafeite law of inheritance is that of J. D. Luciani (Paris, 1890), based on the commentaries of Chenchouri (16th century, A.D.) and others on an ancient law-book in verse, of uncertain date and authorship, known as the "Rahbia."

In noting the points of divergence I have followed the same order as in dealing with the Hanafi system. The figures in small type refer to the sections of this Digest which embody the contrasted rules of Hanafi law.

MARRIAGE.

(IN CONTRAST WITH CHAPTER II.)

23 and **93**—**392.** Not only female minors, but adult women who are virgins, may be disposed of irrevocably in marriage by the father, or, failing him, by the paternal grandfather, with or without their consent; but their consent is nevertheless considered desirable. Patria potestas in marriage.

Failing ascendants, the nearest agnate (nearness being reckoned in the same order as by Hanafi Law) may contract an adult virgin in marriage, provided she does not expressly signify dissent. An adult woman who is not a virgin cannot be disposed of without her express consent, even by her father or paternal grandfather. No woman, whether a virgin or not, can give herself in marriage without the intervention of a guardian; though it is considered an abuse of power on the part of a guardian to refuse to give an adult woman to the husband of her choice, if he is in all respects suitable. Nor can a woman in any case give another woman in marriage, either as guardian or as agent.

2 Minhaj, 321, 322; Hed. 34. And see *Muhammad Ibrahim* v. *Gulam Ahmed*, 1 Bom. H. C., 236 (1864), represented by the illustration to s. 14, *ante* Clavel, Droit Musulman, I, 36, on the authority of Abu Khoja, interposes the *wasi* between the agnates (or the patron and his agnates in the case of a freedman) and the kazi.

The same writer seems to have derived from his authorities the notion that *jabr*, or guardianship for marriage in the strict sense of the term, is not recognised at all by the school of Shafei, and that the so-called guardians (other than the father or true grandfather) are agents for the wife, but agents whom she is obliged to employ and has no voice in selecting

In dealing with guardianship for marriage under Hanafi Law, we had occasion to notice (in note 3 to s. 94) the peculiar rule that where two or more agnates in the same degree are equally entitled to such guardianship, any one of them may validly dispose of a minor of either sex without the consent of the other or others. This precise question cannot arise under Shafeite Law, because a minor cannot be contracted in marriage at all except by the father or grandfather (s. 403); but a closely connected question does arise with respect to the giving in marriage of an adult virgin, and is solved in substantially the same way, except for its being more distinctly laid down that a *mésalliance* requires the consent of all the co-guardians as well as that of the woman herself. See 2 Minhaj, 328, 331.

24.—**393.** The proposal and acceptance of the marriage-contract must be witnessed by two Moslems of the male sex. One male and two females will not suffice.

Female testimony rejected.

2 Minhaj, 319. The Shafeite lawyers are also somewhat stricter as to the quality of the witnesses, most of them considering blindness to be a disqualification, and all insisting on good character.

23.—**394.** If a person has been contracted in marriage by an unauthorised agent, the transaction cannot be rendered valid through the principal's ratification.

Unauthorised agents.

Hed. 42. This difference between the two schools applies to contracts generally, not to marriage-contracts in particular.

37 (Explanation).—**395.** On the question, upon which the Hanafi authorities are divided, as to the exact period of time within which the suckling of two children, or the suckling of one and the birth of the other, must have taken place in order to establish between them the prohibition of inter-marriage on the ground of fosterage, Shafei agrees with the two disciples in fixing the period at two years, as against Abu Hanifa, who fixed it at thirty months.

Fosterage.

Hed. 68; 3 Minhaj, 67; Fath al Qarib, 525.

41.—**396.** There is no fixed legal minimum for dower. It is, however, essential that it should possess some value in the eye of the law, and it is recommended that it should not be less than ten nor more than five hundred dirms.

No minimum for dower.

Fath al Qarib, 471 ; Hed. 44, where the arguments on both sides are stated as usual. For a discussion as to the modern equivalent of a dirm or dirham, see n. 2 to sec. 41 above.

The section numbered as above in the first edition dealt with another supposed difference, namely, that Shafei held maintenance to be due to an infant wife, whereas the Hedaya (p. 141) lays down that " if a man's wife be so young as to be incapable of generation, her maintenance is not incumbent upon him." In attributing the first-mentioned opinion to Shafei, the Hedaya conflicts with the Fath al Qarib, which states distinctly (p. 531) that the husband's obligation to maintain his wife arises when she is declared ready to fulfil her conjugal duties (*munkinat*). The contradiction is explained in the Minhaj which tells us (vol. iii., p. 85) that " *during his sojourn in Egypt*," Shafei adopted the doctrine that the maintenance of a wife only becomes obligatory by the fact of her being placed at the disposition of her husband, and not by the contract of marriage (*bil tamkin la bil akdd*). The same root-verb is employed in both passages, and is clearly understood by the French translator to denote, not simple custody, but (in the language of the Hedaya) custody for the purpose of enjoyment. If so, the statement on the next page, that it is the duty of the guardian of a wife who has not yet attained her majority (*murahikat*) to place her at the disposal of her husband, must apparently be understood of one who is already *viri capax*, though not yet competent to manage her own affairs. But it is quite possible that the expression " at the disposal of her husband " may be used in a perfectly general sense and not in the restricted sense suggested above.

53 (*a*) and Note 1.—**397.** In determining the scale of maintenance due from the husband to the wife, his wealth and position are alone to be considered ; the inferiority of her family in these respects does not justify him in stinting her. Scale of maintenance.

3 Minhaj, 78-85 ; Hed. 140, whence it would appear that Shafei's view was shared by some of the Hanafis. The Minhaj treats the matter somewhat differently, distinguishing three financial conditions : (1) full competence, (2) partial competence, (3) such indigence as will entitle the husband to relief from the poor's rate, and specifying minutely what the husband is bound to provide according to the category in which he finds himself each morning. In one point the wife's antecedents are taken into account, namely, that if she has not been accustomed to be waited on by a servant the husband is not bound to provide her with one, except in case of illness (3 M. 82). Clothes, carpets, bed with pillow, articles of toilet, medicines and medical attendance in case of illness, pocket-money, cooking utensils, house and servants are minutely specified in 3 Minhaj 81-82.

55 (*a*).—**397A.** The wife's maintenance is a debt on the husband, and arrears are recoverable by the wife, though there be no decree of Court or mutual agreement in respect of such maintenance. Arrears of maintenance.

Hed. 143 ; 3 Minhaj, 85 ; *Mahamed Haji*, 41 Mad., 211 (1917). In the Hanafi system, the wife's maintenance is considered in the nature of present, while in Shafei's system it is in the nature of a debt.

DIVORCE.

(IN CONTRAST WITH CHAPTER III.)

63.—398. The revocation of an incomplete divorce can only be effected by express declaration, not by simple renewal of cohabitation.

Revocation must be express.

2 Minhaj, 471; Hed. 103. Shafei's view seems to be that the conjugal bond was really dissolved by the first pronouncement, and that the revocation (*rijaat*) is virtually a re-marriage, though without the repulsive condition which the law imposes after the third repetition of the formula; whereas the Hanafis regard the marriage as subsisting until the third divorce, though the exercise of marital rights is *de facto* suspended, and though a process has commenced which *may* ultimately ripen into a complete divorce. The latter argue with much force that the *rijaat* is confessedly independent of the consent of the wife, and that to allow a man to marry a woman against her will (and without the interposition of guardians) would be utterly anomalous.

64.—399. A divorce pronounced under compulsion of threats is a nullity.

2 Minhaj, 433; Hed. 75. The threats must be of a grave kind, proceeding from a person having apparently the power to carry them out. They may have reference to either person or property.

The majority of Shafei doctors agree with the Hanafis in holding a divorce pronounced in a state of voluntary intoxication to be valid—at least as against the divorcer. The F.Q., p. 483, expressly says that it is enforced as a punishment to the husband; thereby implying that it is generally a gain to the wife to be released from her conjugal duties without forfeiting her pay.

65.—400. Abstinence from sexual intercourse for four months, in pursuance of a vow does not constitute a divorce *ipso facto*, but entitles the wife to demand a judicial divorce or in the alternative immediate resumption of conjugal relations and performance of the legal expiation for breach of vow) if she thinks fit to do so.

Effect of ilo.

3 Minhaj, 7; Hed. 109. It may be well to mention here that if the procedure by *laan* were admitted in the Courts of British India, which probably would not be the case (see note to s. 76, *ante*), a dumb husband would be allowed by Shafei Law, but not by Hanafi Law, to substitute signs or writing for the oral asseveration and oath (Hed. 125; 3 Minhaj, 30).

72, 74, 77.—401. (1) The wife may obtain a judicial divorce not merely on the ground of the impotence of the husband, but also if he is afflicted with madness or leprosy.

Judicial divorce.

(2) The husband may obtain a judicial divorce on the ground of the wife's madness, leprosy, or physical incapacity for sexual intercourse, and may thereby exempt himself from liability for dower, if the demand is made before intercourse has actually taken place, or if the defects supervened after the first *copula*. And it seems that where no dower has been specified, a judicial divorce will cancel the claim for "proper dower," even if the defects existed at the time of the marriage, which was nevertheless consummated, provided that the husband discontinued cohabitation after discovering them.[1]

(3) A judicial divorce can be obtained by the wife on the ground that the husband is unable to afford her maintenance on even the lowest of the three recognised scales.[2]

[1] Hed. 128; 2 Minhaj, 362-364; F. Q. 465. These proceedings are not classed with divorce in the law-books, but are assimilated to the "option of defect" (*actio redhibitoria*) allowed to the purchaser of goods on discovery of some hidden fault. This is not the only occasion on which we find marriage treated as a special variety of the contract of sale. The author of the Minhaj gives it as his personal opinion, though not as undisputed law, that this redhibitory option may also be claimed by either spouse when some particular quality stipulated for in the other, such as Islam, freedom, high birth, turns out not to exist.

[2] Hed. 142; 3 Minhaj, 90; F.Q. 525.

78 (5).—**402.** A wife who has been irreversibly divorced cannot claim maintenance during her period of waiting (*iddat*) unless she be pregnant.

No maintenance during *iddat*

3 Minhaj, 88; Hed. 145, where it is said that "the arguments of Shafei are twofold. *First*, Kattima Bint Kays has said, 'My husband repudiated me by three divorces, and the Prophet did not appoint to me either a place of residence or a subsistence.' *Secondly*, the matrimonial propriety* is thereby terminated, and the maintenance is held by Shafei to be a return for such propriety (whence it is that a woman's right to maintenance drops upon the death of her husband, as the matrimonial propriety is dissolved by that event); but it would be otherwise if a woman repudiated by irreversible divorce, be pregnant at the time of divorce, as in this case the obligation of maintenance appears in the sacred writings, which expressly direct it to a woman under such a circumstance."

"The argument of our [Hanafi] doctors is that maintenance is a return for custody, and custody still continues, on account of that which is the chief end of marriage, namely, offspring (as the intent of edit is to ascertain whether the woman be pregnant or not), wherefore subsistence is due to her, as well as lodging, which last is admitted by all to be her right; thus the case is the same as if she

* *I.e.* ownership.

were actually pregnant; moreover, Omar has recorded a precept of the Prophet, to the effect that 'maintenance is due to a woman divorced thrice during her edit.' There are also a variety of traditions to the same effect." The tradition alluded to in the Hedaya is to be found in the Mishcatul Masabih, vol. i, p. 132 of Capt. Matthew's translation. It is one of the extracts reproduced from that translation in Mahomed Yusuf's Tagore Lectures for 1891-92, p. 131.* The woman is called not "Kattima," but "Fatimah bint Kais." One report purporting to come from Fatima herself, represents the Prophet as distinctly telling her that she was entitled to no subsistence from her husband, and as recommending her to spend her *iddat* with other friends. On the other hand, two traditions are reported from Ayesha, one of them roundly giving the lie to Fatima, and the other explaining that she was simply removed from her husband's house because in his absence it was not thought a safe residence for her. And there is yet a fourth tradition, from one Said bin al Musaib, that she was removed on account of her scurrilous abuse of her husband's relations and friends. In this state of the original authorities, a divergence between the Sunni schools is not surprising.

78 (3).—402A. A man who has repudiated his wife need not wait for the expiration of her *iddat* before marrying another woman, who would have been unlawful to him so long as the former remained his wife; *e.g.*, before marrying the divorced wife's sister,[1] or before completing his legal number, if the divorced wife happened to be one of four.[2]

Right of husband during *iddat* of divorced wife.

[1] Hed. 30, in chap. I of Book II.

[2] Hed. 32.

PARENTAGE.

(IN COTRAST WITH CHAPTER IV.)

81 (*c*).—402B. The longest possible period of gestation is supposed to be not two but four years.

Maximum period of gestation.

Hed. 137; 3 Minhaj, 44.

GUARDIANSHIP.

(IN CONTRAST WITH CHAPTER V.)

93.—403. No relative, except a father or paternal grandfather, has the power of contracting in marriage a boy or girl under the age of puberty.

No agnatic guardianship for marriage.

* The Arabic text is given at the end of the same volume.

2 Minhaj, 332; Hed. 36, where the arguments are set out at length. It should be remembered that even in Hanafi Law, the minor has the "option of puberty" for cancelling a marriage contracted on his or her behalf, by any other than a male paternal ancestor, so that the difference between the two schools is merely as to the party with whom the initiative rests, whether with the minor to cancel the transaction on attaining puberty, or with the guardians to submit a new proposal for his or her approval.

107.—404. (1) Where the parents are separated but the mother has not re-married, unless and until a Civil Court orders otherwise, the custody of a girl remains with the mother until she is actually married (not merely until puberty, as with the Hanafis), and that of a boy until the completion of his seventh year at all events, and from thence until puberty it is said to be at the boy's own option to place himself under either parent.[1]

Duration of, and precedence for, *hizanat*.

(2) The office of *hizanat* devolves, after the full sister, on the consanguine in preference to the uterine sister; and similarly as between aunts, the consanguine sister of either the father or mother of the infant takes precedence of the uterine sister of either parent.[2]

[1] Ameer Ali, M.L. Vol. II, p. 249, on the authority of the *Kitab ul Anwar* and the *Radd ul Muhtar*. The Minhaj at Talibin, iii, 100, allows the option (such as it is) to a child of either sex, and to a fatherless or motherless child, as between the surviving parent and the relative next entitled on the other side. But a boy who elects to remain with his mother is still at his father's disposal for work and study in the daytime. In *Ibrahim Nachi*, 39 Mad., 608 (1915), a Shafei case, a father was allowed custody of his son, under the general law, Guardians and Wards Act (VIII of 1890), s. 25, and it was held that under the Act, the minor continued in the constructive custody of his guardian till the age of 18.

[2] 3 Minhaj, 98.

MAINTENANCE OF RELATIVES.

(IN CONTRAST WITH CHAPTER VI.)

149.—405. There is no obligation to maintain blood relations generally within the prohibited degrees, but only ascendants and descendants.

Collaterals have no claim.

3 Minhaj, 93-97. The Minhaj draws no distinction between sons and daughters, nor between married and unmarried daughters; but the general principle that the obligation to maintain adult descendants is limited to what is absolutely necessary, may perhaps be made to cover all the distinctions drawn by the Hanafi authorities. As regards the principles on which the liability

should be apportioned, whether, for instance, the mother is jointly responsible with the father, or only failing him, the Shafeite authorities are not agreed among themselves.

INHERITANCE.

(IN CONTRAST WITH CHAPTER VIII.)

187, 229.—**406.** Whereas the Hanafi authorities are divided on the question, whether the true grandfather excludes full or consanguine brothers and sisters or shares with them, the latter opinion was certainly that of Shafei.

Rights of true grandfather.

Sirajiyyah, 30; 2 Minhaj, 234; Luciani, p. 327, adds Ali, the fourth Caliph, to the list of authorities on this side. He records three different opinions as to the proper mode of working out the division, and also that the controversy on this subject was so hot among the "Companions" that both Omar and Ali are credited with the pronouncement that whoever spoke most confidently about it, would be in the greatest danger of hell-fire.

221.—**406A.** In one special case a full (but not a consanguine) brother inherits as a Sharer in conjunction with uterine brothers $\frac{\text{or}}{\text{and}}$ sisters; namely, where there are two [or more] of them, the deceased being a woman, and the other Sharers are her husband and her mother. In this case the regular Koranic shares would exactly exhaust the estate, the husband taking one-half (s. 211), the mother one-sixth (s. 214), and the uterine brothers or sisters one-third, thus leaving no residue for the full brother; but to prevent this total exclusion, he is allowed to participate with the uterines in the one-third. In this case he counts as a Sharer, not as a Residuary, and is not allowed the double portion usually assigned to his sex.

The "case of participation."

What is here said of one full brother, applies also to two or more.

2 Minhaj, 235. It is known as "the case of participation" (*Al Musharraka*). Also sometimes as *Al Himariyah*, from the form in which the argument was said to have been put to the Khalif Omar, in favour of the full brother. "If their father had been an ass (*himar*)—in other words, if they had no heritable right at all except through their mother, they would have been better off." To this he might have replied that each full brother must have already inherited twice as much as the *proposita* from their common father, while the present claimants, her uterine brothers and sisters, got nothing from that source, being only step-children. But the Shafeite tradition is that the "ass-argument" so impressed him, that he overruled his own decision of the previous year, and enacted that the law should stand as above stated for the future; Lucianis

Successions Musulmanes, p. 318. The Minhaj does not state explicitly that the participation is to be equal, the full brother counting simply as a uterine brother, but this is placed beyond a doubt by Luciani. This writer also informs us that some Shafeite lawyers adhere to Omar's original rule of absolute exclusion, in agreement with the Hanafis and Hanbalites.

The words " or more " are enclosed in brackets as conjectural, the dual form of the noun being used in the original, but there being no apparent reason why the brother should not participate as well with a plurality of uterine brothers as with two.

238, 239.—**407.** According to the ancient Shafei authorities, there is no " Return," and no place reserved in the order of succession for the (so-called) Distant Kindred (nor, apparently, for the " successor by contract " or " acknowledged kinsman "), so that in default of Sharers and Residuaries the property would escheat to the Bait-ul-Mal. (*See* n. 1 to sec. 265 above.)

Doubt as to "Return," and D. K.

But it is said that the modern practice is (1) to allow the Return " in all cases in which the public revenues are not administered conformably to the law," and (2) on failure of Sharers and Residuaries to admit blood relations, who do not belong to either category, in the following order :—

1. Ascendants (" false grandparents ") ;
2. Descendants (" children of sisters ") ;
3. Full or consanguine or uterine brother's daughters ;
4. Children of sisters (of any description ?) ;
5. Sons of uterine brothers ;
6. Uterine paternal uncles ;
7. Daughters of paternal uncles ;
8. Paternal aunts ;
9. Maternal uncles and aunts ;
10. The kindred of all the above, whether male or female.[1]

(*Submitted.*) The British Government is bound to recognise this modern practice, in the two cases here supposed.[2]

[1] 2 Minhaj, 225, 226 ; compare Sir. 38, from which it may perhaps be inferred that down to the date of the Sirajiyyah—say the middle of the fourteenth century A.D.—the change of practice referred to in the Minhaj (before 1278) had not spread far enough to attract the attention of a professor of the rival school lecturing in Central Asia. Yet according to Luciani, p. 519, the change dates from 400 A.H., = 1010 A.D. Shafei's view, which was also that of Malik was derived, according to the author of the Sirajiyyah, from Zaid, the son of Thabit, the editor of the Koran.

[2] The practice described as modern in the Minhaj, and which therefore can now claim a prescription of at least six centuries, is distinctly a practice concerning inheritance, and a branch of Muhammadan Family Law; and whatever may be the exact idea intended to be conveyed by the words "when the public revenues are not administered conformably to the law," they must certainly apply to any administration by a non-Muhammadan Government.

It will be seen, on comparing Chap. VIII, that the order of succession according to this "modern practice" of the Shafeis differs very materially from the order of succession of "Distant Kindred" among the Hanafis. The most fundamental difference is the preference of ascendants to descendants, which, however, accords with one report of the opinion of Abu Hanifa, noticed in Sir. 35, only to be rejected. As regards collateral D.K., it is difficult to say how much of the apparent difference is real, and how much due to the looseness and brevity of the Minhaj. Luciani, p. 527, finds in his authorities a system of cognate succession, said to be the most generally received among Shafeites and Malikites, differing widely both from the above and from the Hanafi system, but agreeing with the latter in putting descendants before ascendants.

The Minhaj is silent as to the "successor by contract," but Luciani, p. 108 states expressly that this form of succession is peculiar to the Hanafis, and is not recognised by the Shafeites.

263.—407A. If a person acknowledges another person as his brother, this does not entitle the latter to a share in the inheritance of the alleged common parent, even as against the acknowledger himself.

No fictitiously acknowledged kinsman.

2 Minhaj, 92. The commentator offers this as his own suggestion, but admits that the authorities of his school are not unanimous on the point.

264.—407B. A bequest will not take effect as to more than one-third of the net assets, even if there be no other competitor than the public treasury.

Nor "universal legatee."

Van den Berg, "Principes de Droit Musulman," p. 137: "Seul le trésor public être entiérement exhéredé par testament. Telle est au moins l'opinion d'Abou Hanifah, qui, au contraire de Châfii, considère que l'État apprehende la succession, non pas à titre héréditaire, mais à titre de bien vacant."

WILLS.

(IN CONTRAST WITH CHAPTER IX.)

274.—408. If a bequest becomes valid through the consent of the heirs which would have been void without such consent, the legatee is considered to derive his title from the heirs rather than from the testator.

As to bequest confirmed by heir.

Hed. 671; 2 Minhaj, 263, where, however, it is given only as the view of "one jurist," not named, without any expression of either approval or disapproval.

275.—**409.** A bequest is not rendered void by the fact of the legatee causing the death of the testator. Legatee slaying testator.

2 Minhaj, 260.

279.—**410.** It seems to be an unsettled point in the school of Shafei, whether the will of a minor can in any circumstances be held valid. Doubt as to will of minor.

2 Minhaj, 258, where "one jurist" is said to have maintained that "the prohibition does not extend to the minor who has attained the age of discernment." The Hedaya (p. 673) imputes to Shafei himself the somewhat different doctrine that a bequest by an infant is valid, "*provided it be made to a discreet and advisable purpose;* because Omar confirmed the will of a Yaffai (that is, a boy who has nearly reached the age of maturity), and, also, because in the execution of it a degree of advantage results to the infant, inasmuch as he acquires the merit of the deed, whereas in the annulment of it, he is deprived of all advantage." Does this mean that the Court would require to be satisfied affirmatively of the wisdom and justice of the disposition, or merely that it would be liable to be set aside if shown to be so foolish, that it would raise suspicion of insanity or undue influence in the case of an adult testator? However that may be, the Hanafi doctors (as represented in the Hedaya) deny *in toto* the possibility of a boy under the age of puberty, having sufficient judgment for the purpose evade the force of Omar's precedent by some rather feeble suggestions, and insist that the annulment rather than the confirmation of the will is an advantage to the infant, because "in allowing his property to pass to the heirs the rights of natural affection are maintained." As to the infant "acquiring the merit of the deed," instead of the obvious reply that there can be no self-denial, and consequently no religious merit, in a posthumous disposition, they argue in the spirit of a well-known legal maxim (*in jure non remota causa sed proxima spectatur* *), that "the point to be attended to in cases of advantage or loss is the immediate tendency, and not what may eventually result from it," and that in this case the immediate result is a loss of property (to the infant, we are meant to understand; really, of course, to the heirs).

Supposing this to be the true Shafei doctrine, is it over ruled by the Indian Majority Act? I think not. The Act merely fixes the age at which minority is to terminate; it does not interfere with a rule of the Muhammadan personal law, permitting a particular act to be done by a person who is confessedly a minor according to either law. On the other hand, any rule of Muhammadan Law restraining alienations by adults who are weak-minded, without being lunatics, after the fashion of the Roman and French laws respecting prodigals, would seem to be excluded from the purview of the Civil Courts Acts, and consequently to have no force in British India. I have therefore not noticed in the text the doubt whether under Shafeite Law an adult who is under curatorship as a prodigal, can make a will. According to 2 Minhaj, 258, and F.Q. 439, he can, and apparently without the sanction of his curator; whereas according to the Hedaya (p. 527) the doctrine of Shafei is that after inhibition no act whatever of the prodigal is valid except divorce.

This would have been the proper place to insert a section to the effect that the Shafei Law (2 Minhaj, 282) does not allow one of two executors to act alone in any matter whatever, unless expressly authorised to do so by the terms of the will, whereas the Hanafis carefully distinguish the matters which do, from

* The law looks not to the remote but to the immediate cause.

those which do not, require the concurrence of both executors. But the law of both schools appears to be now superseded by that of the Probate and Administration Act, 1881, s. 92 (= s. 179, *ante*).

Death-bed gifts.

284.—**410A.** The rule assimilating gifts made in expectation of death to legacies is not limited to cases of mortal sickness, but applies also to some other circumstances of extreme peril.

2 Minhaj, 266 ; capture in war by infidels not accustomed to give quarter sentence of death ; a tempest at sea.

Death-bed acknowledgment.

286.—**410B.** A claim proved only by a death-bed acknowledgment is not postponed to one supported by an acknowledgment made in health.

Hed. 436 ; 2 Minhaj, 75 ; F. Q. 367.

Bequest of use.

290A.—**411.** The legatee of the use of a house is entitled to let it as well as to reside in it.

2 Minhaj, 275 ; Hed. 693, where the arguments on both sides are fully stated. They turn substantially on the question whether a bequest of *manafaa* is a mere licence, given gratuitously, and therefore to be construed strictly, or as Shafei held, creates a kind of limited ownership. The Minhaj discussed the point solely with reference to using or letting out the services of a slave.

GIFTS.

(IN CONTRAST WITH CHAPTER X.)

Mushaa.

208.—**412.** The gift of an undivided share in any property (*mushaa*) is equally valid, whether or not the thing is capable of partition.

Hed. 483, confirmed by the silence of the Minhaj, and of the Fath al Qarib. The arguments on both sides are set out at length in the Hedaya.

Life-estates.

313.—**412A.** There is some authority for the proposition that life-estates are recognised by the Shafei school.

Mahomed Ibrahim, 37 Bom., 447 (1912) at p. 458. The Minhaj is silent on the point.

Revocation.

316.—**413.**—(1) No person except a father or other [paternal ?] ancestor is allowed to retract a gift once validly made. The ancestor's right of retractation (like the general

right of retractation under Hanafi Law) is lost as soon as the thing passes out of the possession of the original donee.[1]

(2) On the other hand, where the right of retractation would otherwise exist, it is not taken away by the mere fact of the thing having increased in value through natural accretion. If such accretion is incorporated with the original subject-matter, no account at all is taken of it. If it is separated, as the young of an animal, or fruit gathered from a tree, the revocation applies only to the original subject-matter of the gift, and the increase remains with the donee.[2]

[1] [2] Minhaj, 195-197; Hed. 485. According to the Hedaya, the only person to whom Shafei allows the right is the father himself, while the Minhaj speaks of "the father and the ascendants generally." I suspect that the truth lies between the two, and that the right of the father is really extended (as in so many other cases) to the "true grandfather," but not to female ancestors or false grandparents. It is curious that the one case in which Shafei allows revocation is included among those in which the Hanafis disallow it, namely, gifts to *relations within the prohibited degrees*, among whom "children, how low soever," are expressly mentioned. (Baillie, 525.)

The whole passage of the Hedaya in which the arguments on both sides are summarised is perhaps worth quoting.

"It is lawful for a donor to retract the gift he may have made to a stranger." Shafei maintains that this is not lawful; because the Prophet has said—"let not a donor retract his gift; but let a father, if he please, retract a gift he may have made to his son;" and also, because retractation is the very opposite to conveyance—and as a deed of gift is a deed of conveyance, it consequently cannot admit its opposite. It is otherwise with respect to a gift made by a father to a son, because (according to his tenets) the conveyance of property from a father to the son can never be complete; *for it is a rule with him that the father has a power over the property of his son.* [This is a very remarkable statement, of which I have not been able to find any confirmation in the Minhaj.] The arguments of our doctors on this point are two-fold. *First*, the Prophet has said, 'A donor preserves a right to his gift, so long as he does not obtain a return for it.' *Secondly*, the object of a gift to a stranger is a return; for it is a custom to send presents to a person of high rank that he may protect the donor; to a person of inferior rank that the donor may obtain his services; and to a person of equal rank that he may obtain an equivalent and—such being the case it follows that the donor has a power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment.* With respect to the tradition of the Prophet quoted by Shafei, the meaning of it is that the donor

* Compare Bentham's maxim, "every alienation imports an advantage"—the advantage being, in the words of that philosopher, "pleasure of friendship or of benevolence, if the thing was given for nothing; pleasure of acquisition, if it was a means of exchange; pleasure of security, if it was given to ward off some evil; pleasure of reputation, if the object was to acquire the esteem of others."

But it should be observed that where the gift is in the nature of almsgiving (*sadkah*), in other words, where it is clear that no return could have been expected, and that the object of the donor was to obtain the pleasure of benevolence or of reputation, or else that of "nearness to God" (an object not noticed in this place by Bentham), retractation is not permitted even by the Hanafi lawyers

is not himself empowered to retract his gift, as this must be done by decree of the Kazee, with the consent of the donee—excepting in the case of a father, who is himself competent to retract a gift to his son, *when he wants it for the maintenance of the son;* and this is metaphorically termed a retractation."

[2] 2 Minhaj, 195, contrasted with Hed. 486, where the first of the two cases, namely, the incorporation of an increase with the gift, is reduced to the following dilemma: "A retractation cannot take place without including the increase as that is implicated; and it cannot take place so as to include the increase since that was not included in the deed of gift." To this Shafei might have replied that, unless and until some other cause is shown (*e.g.* labour of the donee), the original gift must be taken to be the cause of the increase.

It should be understood that here, as in Chapter X, the word gift is used in its proper English sense to denote a purely gratuitous transaction, and does not include what the Muhammadans call *hiba bil iwaz*, gift for, or in expectation of, a return. Both schools permit the revocation of such gifts, where the return enjoined by custom, or which the donor was led to expect, has been omitted.

WAKF (ENDOWMENT).

(IN CONTRAST WITH CHAPTER XI.)

What can be dedicated.

318.—**414.** Everything which is—

(*a*) not necessarily consumed in the using, and

(*b*) lawfully saleable,

can be validly dedicated as *wakf*.

Hed. 356; F.Q. 399. The Minhaj (II, 182) does not go quite so far; indeed it appears in the French translation to say that the subject must be such as *can* be used perpetually (*que l'on en puisse faire un usage perpetuel*). But we afterwards read of a slave or an animal being appropriated, so that the Arabic expression *dawam al intafaa bihi*, must be taken to denote merely "continuous user," as opposed to being consumed in the using.

Wakf complete without delivery.

320.—**415.** An appropriation is complete as against the appropriator from the moment of his declaring it to be so, without waiting for actual transmutation of possession[1]; but where an individual is specifically named as usufructuary, his title is not complete without a declaration of acceptance on his part.[2]

Hed. Book XV, p. 232. See also 2 Minhaj, 184, 185, where, though there is no express statement either for or against the necessity for delivery to extinguish the title of the appropriator, the negative may reasonably be inferred from the exclusive insistance on explicit declaration of intention, on one side or on both, according to the nature of the appropriation. Abu Yusuf was of the same opinion as Shafei on this point, but the opposite view of Muhammad is now settled to be the law of the Hanafi school, in Bengal at all events.

[2] 2 Minhaj, 185. "A foundation in favour of a certain and determinate person is not complete without acceptance; which acceptance cannot in any case take place after a previous refusal."

323 (2).—**416.** It is not necessary that the primary object of the foundation should be religious or charitable, in the English sense of those terms.[1] An appropriation in favour of (for instance) the founder's descendants, generation after generation, without any ulterior object of wider scope, is perfectly valid.[2] Nor is it even necessary that an indefinite succession of beneficiaries should be provided for. A settlement in favour of a single specified individual is valid so far as it goes, and on his death, the usufruct will devolve on the nearest relative of the founder then living.[3]

Wakf in favour of descendants certainly valid.

[1] 2 Minhaj. "A foundation with an unlawful aim, such as the erection of Christian churches or of synagogues, is null; but it is perfectly legal, as well where it has been made with a pious aim, such as a foundation in favour of the poor, of learned men, of mosques, or of schools, as where the aim is not a manifestly pious one—*for example, if it is the case of a foundation in favour of the rich.*"

[2] 2 Minhaj, p. 187. "A foundation in favour of 'my children and my grandchildren,'" has for its effect that the usufruct must be divided equally among all the children and grandchildren existing at the date of the foundation. On the other hand, when the terms employed are "in favour of my children, then of my grandchildren, then of my great-grandchildren, who are their descendants" . . . there is successive enjoyment on the part of the several generations, and those who come first are only usufructuaries subject to the trust in favour of their successors (*Fr. usufruitiers fiduciaires*). F.Q. 403 is to the same effect.

If the parties in *Mahomed Ahsanulla* (17 Cal., 498, [1889]), had happened to be Shafeites, the above passage would presumably have been brought to the notice of the Privy Council, and it would have been impossible for their Lordship to say, as they did, that "they have not been referred to, nor can they find any authority showing that, according to Muhammadan Law, a gift is good as a *wakf*, unless there is substantial dedication of the property to charitable uses at some period of time or other."

In *Mahomed Ibrahim*, 37 Bom., 447 (1912) the parties were Shafeis, and the *wakf* was in favour of the family, with an ultimate trust "for the education of Mahomedan youths." And yet the Shafei law seems to have been lost sight of, and the wakfnama seems to have been assumed on all sides to be void for infringing the rule against perpetuities, though it was allowed a limited validity as against certain parties, by the doctrine of estoppel.

In Ameer Ali's Muhammadan Law, it is asserted (vol. i, p. 225) and powerfully argued, that all the schools and all the jurists recognise the validity of *wakfs* in favour of descendants. But the British Courts having decided otherwise for *wakfs* anterior to 1913 in a series of cases, all of which were between Hanafis, and chiefly on the authority of the Hedaya,* a Hanafi treatise, I am obliged to note this as a peculiarity of Shafei Law. The Mussalman Wakf Validating Act VI of 1913, expressly declares valid any Muhammadan wakf for the maintenance and support, wholly or partially of the settler's family, children, or

* Or rather on the stength of the silence of the Hedaya; for in reality that treatise lends no more support to the negative than to the affirmative side of the question. Indeed, considering the habit of the author to notice every divergence of Shafei from the teaching of his own school, his silence rather tends to show that on this point no divergence existed; in other words, that is undoubtedly the Shafeite view is also that of the Hanafis. See Appendix B.

descendants, provided that the ultimate benefit is expressly or impliedly reserved for the poor, or for a religious, pious, or charitable purpose of a permanent nature: sec. 3 (*a*) of the Act, and proviso. See the Act and Notes in Appendix B below. As regards the proviso just mentioned, it will probably not apply to any peculiarities of Shafei law, which are saved by sec. 5 of the Act.

[3] 2 Minhaj, 185. "When a person makes use of the expression, 'I immobilise in favour of my children,' or 'in favour of Zeid, and after him in favour of his descendants,' without more, the settlement is valid, and even after the extinction of the persons mentioned the better opinion is that it will continue to subsist as a *wakf*, and will be enjoyed by the persons who are nearest of kin to the founder at the date of the extinction of the persons mentioned." The Minhaj is silent as to what is to become of the foundation in the event of the founder's kindred, as well as the series of persons named in the settlement becoming extinct; nor does the Fath al Qarib afford any help. But as both books state unequivocally that property once immobilised, ceases to be *in commercio*, and is considered to belong thenceforth to Almighty God, it would seem that if the Court is to be guided by Muhammadan principles it should frame a scheme for some religious or charitable purpose. The alternative would be to hold that the operation of Muhammadan Law is exhausted, and that the property escheats to Government, which would be wholly opposed to the spirit of the whole system.

447.—**417.** If the founder of a mosque directs that it shall be devoted to worship according to the ritual prescribed by a particular school, that of Shafei, for instance, the limitation must be respected, and the followers of that school will be entitled to use the mosque, to the exclusion of all other believers.

Mosque may be dedicated for exclusive use of one school.

2 Minhaj, 186. As has been shown in Chap. XI (see notes to s. 349, *ante*), there are *dicta*, but no actual decisions, to the effect that the Hanafi Law does not allow such restrictive dedications, and the weight of those *dicta* is considerably diminished by the fact that the Shafei authority to the contrary was not brought to the notice of the judges who enunciated them.

PRE-EMPTION.

On the question, Whether any rules of pre-emption, other than those of the Hanafi school, come properly within the scope of this work? see note in the next chapter, following sec. 484 B.

356-459.—**418.** Pre-emption cannot be claimed on the mere ground of vicinage, nor on the ground of "participation in the appendages," but only on the ground, of co-ownership.[1] And the shares claimable by several co-owners in the pre-empted property are not necessarily equal, as in Hanafi Law, but proportional to their respective interests in the property before it was sold.[2]

No pre-emption except by co-sharers their rights not necessarily equal.

[1] 2 Minhaj, 120; Hed. 548, where the arguments on both sides are given at length. The chief point is that Shafei takes no account of any danger to be guarded against by pre-emption except the danger that a stranger purchasing an undivided share in partible property, will naturally be disposed to insist on a partition, which may be inconvenient to the co-sharers, whereas the Hanafis regard the mere neighbourhood of a stranger, whether divided or undivided, as a probable source of annoyance.

Apart from reasons of convenience, the Hanafis allege sayings of the Prophet which would be so conclusive if admitted that we must assume their authenticity to have been denied by Shafei, though there is no express statement to that effect.

The Maliki School also allows pre-emption only to co-sharers: Perron Prácis de Jurisprudence Musulmane, vol. iv, p. 420. See also Ibn Arfa's definition of Pre-emption in F. H. Ruxton's *Maliki Law*, p. 223.

[2] Hed. 549 (arguments on both sides); 2 Minhaj, 127; F. Q. 379. At p. 192 of the Minhaj the same principle of proportional pre-emption is applied to a case which was supposed until lately not to raise any question of pre-emption at all according to Hanafi Law *; namely, where one of three co-proprietors sells his share to another. Though no intrusion of a stranger is involved, the author nevertheless considers that the co-proprietor is entitled to pre-empt to the extent of one-third of the share sold, that is one-sixth of the whole property. He admits, however, that his doctrine is not undisputed.

356.—419. Pre-emption cannot be claimed even by a co-sharer with respect to immovable property which, cannot be divided without diminishing its utility, and with respect to which therefore the law would not allow a claim for partition on the part of a stranger-purchaser, such as a bath, a mill, or a private road;[1] except that, if two adjoining proprietors otherwise unconnected, own in common a private road leading to a public thoroughfare, and one of them sells his property, including his share in the private road, to a stranger, the other may (perhaps) pre-empt the share in the road, if he can show that the purchaser can obtain equally convenient access to the public thoroughfare in some other way, but not otherwise.[2]

No pre-emption of indivisible property.

Exception.

[1] 2 Minhaj, 120; Hed. 558; the reason given is the same as for the preceding section.

[2] 2 Minhaj, 120-121.

362.—419A. In the case of a sale on credit the pre-emptor is not put to his election, but may claim both immediate possession and the stipulated respite of payment.

Sale on credit.

* See s. 361, *ante*.

Hed. 555. Nearly the whole passage, in which the arguments of Shafei and of Ziffer, a Hanifite authority, are stated and controverted in the Hedaya is quoted under s. 362, *ante*. [I think that allowing for differences of opinion among Hanafi authorities, the true Hanafi doctrine in this respect does not differ from that of Shafei. If this is accepted, the present section might be deleted as unnecessary.—A.Y.A.]

366-369.—**420.** Pre-emption is not limited to cases in which there is an actual sale or barter, but applies whenever the transfer is (1) for valuable consideration and (2) complete and irrevocable.

Actual sale or barter not necessary.

Illustration.

If a share in a house has been conveyed by a husband to a wife as her dower, or by wife to her husband as the consideration for a Khula divorce, or by one person to another in consideration of a fixed annual payment, or by way of payment in advance, for goods to be delivered at a future time and not yet ascertained, the co-proprietor of that house can claim pre-emption.

2 Minhaj, 121; Hed. 559.

385.—**421.** The right of pre-emption is not extinguished by the death of the pre-emptor in the interval between the sale which gave occasion to the exercise of the right and the perfecting of his title by surrender of possession on the part of the vendee or by judicial decree. The heirs of the deceased stand in his place in the same way as they would have done if he had died either before the sale or after the completion of his pre-emptive title.

Right never extinguished by death of pre-emptor.

Hed. 561, 562. If the ruling in *Sayyad Jiaul Hussan Khan*, 36 Bom., 144 (1911), is good law, the conflicting doctrines of Hanafis and Shafeites are superseded by s. 89 of the Probate and Administration Act, 1881. See under s. 385, *ante*.*

It is perhaps worth noticing that neither the Minhaj nor the Fath ul Qarib contains anything about the three distinct and successive demands—the *talab-mowasibat*, *talab-ish-had* and *talab-khusumat*, on which so much stress is laid by the Hanafi authorities. These two Shafeite writers are content to lay down in general terms that the right of pre-emption is lost if the claim is not made with reasonable promptitude after receiving reliable information of the sale. He need not (it is said) make such haste as if he were being pursued by enemies. We are not told to whom the demand should be addressed, but presumably it should be to the purchaser. If the pre-emptor is prevented by absence or illness from making the claim in person, he may make it through an agent, and if he cannot find a suitable agent, he should declare his intention before witnesses; which seems rather to imply that witnesses are not necessary in other cases.

* It was a disputed question of fact in this case whether the deceased pre-emptor was a Hanafi or a Shafeite.

But, on the other hand, the Hedaya makes no mention under this head of any divergence between the schools, and it may be that the elaborate formalities described by the Hanafi lawyers are meant to be covered in the Shafeite text-books by the expression "according to custom," details being omitted for the sake of brevity, as the whole subject is treated on a smaller scale. See 2 Minhaj, 129; F.Q. 377.

We may possibly account in the same way for the absence of any mention of "devices" for defeating the right of pre-emption (see above, s. 391). Or it may be that the fact of the right being allowed to none but co-sharers renders its exercise so much less vexatious as to supply no sufficient motive for resorting to evasive devices.

CHAPTER XIV.

PECULIARITIES OF THE SHIA LAW (AKHBARI SCHOOL).

For the distinction between Akhbaris (School of Tradition) and Usulis (School of Principles), see Ameer Ali, M. L., vol. i, p. 36, vol. ii, p. 13, and Spirit of Islam, p. 511. It should be remembered that both schools belong to the Asna Asharya branch of the Shia sect. (s. 13, *ante*).

The standard work on Akhbari Law is the *Sharái' ul Islam*, the author of which, Shaikh Najmuddin Abul Kasim Jaafar Ibn Ali Yahya, surnamed Al Mohakkik, died in Persia, A.D. 1278, the same year as the author of the Minhaj-at-Talibin, the standard treatise on Shafei Law. Mr. Justice Ameer Ali says of him : " It is hardly possible to exaggerate the baleful influence of this legist among the Shia communities which have adopted his views. His literal views, which have paralysed all movement of the intellect, are chiefly in force among the Akhbaris " (M. L. vol. i, p. 27).

The Second Part of Baillie's " Digest of Muhammadan Law " is stated (p. 26) to be composed entirely of translations from the Sharái' ul Islam, with the exception of the last Book, which is an additional treatise on the Law of Inheritance taken partly from the Sharái' and partly from other sources. The entire work has been translated into French by M. Querry, under the title, Droit Musulman (Paris, 1881). References are given to both versions throughout this chapter.

As in the preceding chapter, the sections of this Digest which represent the contrasted rules of Hanafi Law are noted in the margin.

MARRIAGE AND DIVORCE.

(IN CONTRAST WITH CHAPTERS II AND III.)

Two kinds of marriage.

422. The Shia Law, as administered in India, recognises two kinds of marriage or legalised cohabitation—one regular and permanent, the other irregular and avowedly temporary. Except where the contrary is stated, all that is said in this chapter respecting marriage refers to the former kind.

Querry, vol. i, p. 639 ; Baillie, II, p. 1, heading of Book I. " There are three kinds of *nikah*, permanent, temporary, and servile." The possession of a slave concubine is legally impossible in British India, and in any case would not be properly described by the English term " marriage."

Option of puberty.

81 (*b*), **19, 20.**—**422A.** Every person, other than a father or paternal grandfather, contracting a marriage for a minor, is as *fuzuli*, or unauthorised person, and consequently a marriage

so contracted, has no legal effect at all until expressly ratified by the party concerned on arriving at puberty.

Ameer Ali, M. L., vol. i, p. 339, on the authority of the Mafatih and the Jámi' ush Shittat. *Mulka Jehan* v. *Mahomed*, L. R., Ind. App., Sup. vol., 192 (1873); s.c. 26 W. R., 26.

23.—**423.** Social inferiority on the part of the bridegroom affords no ground for cancellation of marriage. No cancellation for inequality.

Querry, I, p. 685, ss. 328, 329, 330; Baillie, II, 34. "It is lawful for a free woman to marry a slave, for an Arabian woman to marry a Persian, or for a woman of the tribe of Háshim (to which Muhammad belonged) to marry a non-Hâshimite, and *vice versâ*. In like manner, men engaged in worldly trades ("artisans"—Querry) may lawfully enter into the contract of marriage with women possessed of property in debts owing to them and in houses." And, lastly, we have a clause which is remarkable as going beyond mere permission: "If a true believer, competent to maintain a wife, should pay his addresses to a woman, *it is incumbent on her to accept him* (*elle est tenue d'accepter*—Querry), though he be her inferior in respect of *nusub*, or ancestry; and it would be sinful in a guardian to forbid the marriage." The meaning seems to be that the marriage should not be declined *on the ground of merely inferior social status*.

24.—**424.** The presence of two witnesses is not absolutely necessary to the validity of a marriage. Witnesses.

Querry, I, p. 648, s. 49; Baillie, II, 4.

24.—**425.** It is not so clear as in Hanafi Law, that no religious ceremony is essential to the validity of a contract of marriage. Religious ceremonies.

The Sharái' (Querry, I, p. 640, s. 7) merely mentions certain prayers, &c., which *ought* to be uttered, but says nothing about the legal consequences of omitting them; and the English translator omits even this, apparently considering the directions to have no legal significance. But in Ameer Ali's "Muhammadan Law," vol. ii, p. 283, it is said that "whilst the Sunnis simply *recommend* the use of the Khutbah before the contract is finally executed, and of the Súrat-ul-Fátiha (the opening chapter of the Koran) at the conclusion of the marriage, the Shiahs consider the use of these to be to some extent obligatory." These, however, are not religious ceremonies in the sense of requiring the presence of any persons except the parties and their friends. They are only ceremonies of solemnity.

37.—**426.** In order to establish a relationship by fosterage, and consequent prohibition of intermarriage, it is not sufficient that one act of suckling should have taken place, but it must have been repeated at least fifteen times, Fosterage.

or have been continued for a day and a night. It is also necessary that the foster-mother's milk should be the result of marriage, not of fornication.

Baillie, II, 15, 16; Querry, I, p. 658, 126, 136.

38.—**426A.** A man may wed the niece (though not the sister) of his undivorced wife, with the latter's permission; and may conjoin an aunt with her niece even without the niece's permission.

Unlawful conjunction.

Baillie, II, 23. Querry, I, 668, ss. 206, 207, 208. Tornauw, p. 65, mentions the former rule, but not the latter.

39.—**427.** According to the majority of Akhbaris, marriage of the permanent kind is unlawful not only, as in Hanafi Law, between a Muhammadan of the male sex and a female infidel, who is not a Kitabia, and between a female Muhammadan and any infidel, whether Pagan or Kitabi,[1] but with infidels of either sex and any creed.[2]

Difference of religion.

[1] See, as to this, *Bakshi Kishen Prasad*, 19 All., 377 (1897)—marriage according to Muhammadan rites of a Shia woman with a Christian, held void on the authority of Baillie, II, 40, where the converse case is put of a Kitabi marriage being cancelled by the wife embracing Islam.

[2] Baillie, II, 29; Querry, I, p. 674, s. 256. It is said (Ameer Ali, M. L., vol. ii, p. 277), that the Usuli Shias and the Mutazilas agree with the Sunnis in permitting marriage between a Moslem of the male sex and a Kitabia; and that some Indian Shias take this view seems to be proved by the case of Mrs. Meer Hassan Ali, the authoress of "Observations among the Mussulmans of India" (published in 1832), who lived for twelve years with a Shia husband in Oudh, then a protected native state, all the time openly professing the Christian religion; unless, indeed, we assume her to have been a mere *muta* wife, which the general tone of her narrative renders very unlikely.

In *Abdul Razak*, 21 Cal., 666 (1893), the P. C. were invited by counsel, in connection with the alleged marriage of a Shia Muhammadan, to consider the question whether the Buddhist woman could be reckoned a Kitabia. In declining to be drawn into such a discussion, on the ground that the point had not been raised in the Court below, their Lordships incidentally took for granted that if the woman had been a Kitabia, she might have lawfully intermarried with *any* Muhammadan; their attention not having been drawn to the difference between Shias (of at least some schools) and Sunnis.

According to Querry's understanding of the Sharái' (I, p. 684, ss. 324, 325, and p. 685, s. 333), profession by both spouses of the Shia form of Islamic belief is indispensable; not so according to Baillie, II, 34, 35. In *Nasrat Husain*, 4 All., 205 (1882), a suit between Shia husband and Sunni wife, the validity of the marriage was taken for granted, and it was held that the wife was entitled to the privileges secured to her by the law of her own sect.

41.—**428.** The dower may consist of personal services to be rendered to the wife, either by a third person through the husband's procurement, or by the husband himself. Nor is the ten *dirms* limit recognised, though it is necessary that the subject-matter of the dower should have some appreciable value in the eye of the law. Dower.

Baillie, II, 67, 68 ; Querry, I, p. 716, ss. 555, 556, 560.

I do not understand M. Querry to mean that a contract for *menial* services to be rendered by the husband to the wife in lieu of dower would be valid even among Shias, and there are obvious reasons why it should not be. The passage speaks first of " the services *of a free person,* such as the teaching of an art of an industry, of a chapter of the Koran, or of any other legal art or science," and then of " the personal service of the husband," meaning presumably some service similar to those before mentioned, and not such as would ordinarily be performed by slaves in a Muhammadan country. Further on, the effect of a contract that the dower should consist in the husband teaching the wife a chapter of the Koran is discussed with a minuteness, which would seem to indicate that this form of dower was at one time as popular with husbands as it was inexpensive.*

There is no maximum or minimum limit to the amount or value of the dower which may be stipulated between the parties : Baillie, II, 68.

42.—**429.** The " proper dower," to be awarded by the Court when none has been stipulated for in the marriage-contract must never exceed [whatever the Court may consider to be the modern equivalent of] five hundred *dirhams.* Limit of "proper dower."

Baillie, II, 71 ; Querry, I, p. 720, s. 589.

The tradition is that 500 dirhams was the largest amount ever assigned by the Prophet to any of his wives.

As to the value of the *dirham* or *dirm,* see under s. 41 ; and as to modern legislation for Oudh, the province in which the Shias are most numerous, see s. 44, *ante.* The only correct way of estimating the " modern " value of an ancient silver coin is to take the equivalent weight of silver, and apply the factor represented by the difference in the purchasing power of silver at any given date, assuming the latter to be now normally at most one-fourth of what it was when dower minima or maxima were fixed, it was estimated in note 2 to sec. 41 that in modern Indian money, the dirham was at least Re. 1-10. But the Great War has enormously reduced the purchasing power of currency in all countries including India, and it is impossible to say what the new normal level may be within the next ten years. In a rule of thumb way, it may be stated that the dirham now would be over Rs. 2 or 2-8.

42.—**430.** The same limit must be observed, if by the terms of the contract the amount of dower is to be fixed by the bride at her discretion. Even when left to bride's discretion.

* If, however, the husband undertakes to teach a chapter of the Koran of which he is ignorant, he is bound to pay the hire of a competent instructor.

Baillie, II, 73; Querry, I, p. 722, s. 602.

46.—**431.** There has never been, as in the Hanafi Law, any conflict of opinion as to what should be presumed to have been intended where nothing is said in the marriage-contract as to dividing the dower into two portions, one "prompt" and the other "deferred." It is undisputed Shia Law, that in such cases the whole is presumed to be prompt.

The whole presumed to be "prompt."

Ameer Ali, M. L. vol. ii, p. 387, referring to the *Jàmi' ush Shittàt*. It is curious that in the Privy Council case of *Mirza Bedar Bukht*, 19 W. R., 315 (1873) which may perhaps be considered to have settled the law for Indian Hanafis, and also in *Masthan Sahib*, 23 Mad., 371 (1900), which is the latest ruling on the same side, the parties were in fact Shias, though no notice was taken of this in either judgment.

78 (6).—**432.** Not only, as in Hanafi Law, does a triple repudiation involve the consequence that re-union with the divorced wife is unlawful until she has contracted, and consummated, a marriage with some other man and been by him divorced; but even this process can only be gone through twice, and after three triple repudiations (or nine in all) re-union is not permitted on any terms.

Re-marriage cannot be legalised after the third triple repudiation.

Baillie, II, 119; Querry, I, p. 674, s. 252. It will be seen presently (s. 435) that the triple divorce itself is subject to stricter conditions among the Shias than among the Hanafis.

78 (4).—**433.** The principle that "retirement" in circumstances affording full opportunity for sexual intercourse is equivalent to actual consummation for the purpose of determining the wife's rights on divorce, and for some other legal purposes is repudiated by the majority of Shia lawyers.

"Retirement."

Baillie, II, 74; Querry, I, p. 723, s. 606.

64.—**434.** A divorce pronounced by a person in a state of intoxication, or under compulsion of threats of a serious nature, is a legal nullity.

Intoxication and compulsion.

Baillie, II, 108; Querry, II, p. 2, ss. 4, 9, 10. On the second point, the Shafeites agree with the Shias (s. 399).

61 (c).—**435.** Those forms of divorce which the Sunnis consider to be irregular, but valid (*talak ul bidaat*), especially that of rendering the divorce irreversible by pronouncing the formula three times in immediate succession, instead of pronouncing each in a different period of purity during which no intercourse takes place, are absolutely null according to the Shia.

Irregular divorce absolutely null.

Baillie, II, 118; Querry, II, p. 12, s. 86.

62.—**436.** A divorce (*talak*) must be pronounced orally, in the presence of two competent witnesses. The communication of a divorce in writing is only permitted where the husband is physically incapable of pronouncing it orally.

Form of divorce.

Baillie, II, 113, 114; Querry, II, p. 7, s. 48. It is further laid down that both for contracting and for dissolving marriage no language, but the Arabic may be employed "when there is ability to pronounce the words specially appointed."

TEMPORARY MARRIAGE.

437. It is lawful among Shias to enter into a contract of marriage for a limited period, which must be distinctly specified. If there is no mention of any definite period of time, the contract is held to be permanent.

Temporary marriage.

On the expiration of the term the conjugal relation dissolves of itself, but may be re-established by mutual consent.

Baillie, II, 42; Querry, I, p. 689, s. 358; p. 693, ss. 390-394.

32.—**438.** The rule that a man cannot lawfully have more than four wives at a time, which is common to Shias and Sunnis as regards regular marriage, has no application to the Shia temporary marriage.

Number unlimited.

Baillie, II, 28; Querry, I, p. 673, s. 243.

39.—**439.** Difference of religion is not a bar to temporary marriage among Shias in any case in which it would not be a bar to permanent marriage among Sunnis; that is to say, a Shia of the male sex may contract a temporary marriage with a Kitabia, though a Shia woman may not marry,

May be contracted with Kitabias.

even in this form, any man who is not of the same religion, and even of the same sect as herself.

Including Parsis.

And further, the Shias reckon among Kitabias not only Jews and Christians, but Magians—that is, Persian fire-worshippers—so that in India a Shia may lawfully contract a temporary marriage with a Parsi woman.

Baillie, II, 29, 40; Querry, I, p. 674, s. 256, and p. 690, s. 366.

41, 42, 43.—**440.** A contract of temporary marriage is void unless it contains a distinct stipulation as to dower, and the dower must consist of something recognised by the law as property; but there is not, as in a Sunni marriage, any minimum limit of value.

No minimum dower.

Baillie, II, p. 41; Querry, I, p. 691, ss. 380-383. This is quite in harmony with the principle of English Law, embodied in s. 25 of the Indian Contract Act that an agreement without valuable consideration is not, in general, enforceable as a contract. The alternative plan of implying a promise on the man's part to pay, under the name of "proper dower," whatever sum the Court might find to be reasonable, is adopted by Shias as Sunnis in the case of a permanent marriage, but would naturally be considered unsuitable to these temporary arrangements, which are rather tolerated than encouraged.

There is no minimum dower in a Shia marriage, whether permanent or temporary. Its quantity is left to be determined by mutual agreement. Cf. above, sec. 428 and notes.

53, 55 (*c*).—**441.** A temporary marriage does not of itself involve any right to maintenance depending on the Shia Law.[1] It has been held to involve the statutory right, extending to fifty rupees monthly as maximum, which is given to every wife in British India, irrespective of her personal law, by the Code of Criminal Procedure, s. 488,* under the conditions therein stated[2]; but the husband can at any time escape from this liability, supposing it to exist, by releasing his claim to her society for the remainder of the specified term.[3]

Doubt as to maintenance.

[1] Baillie, II, p. 97; Querry, I, p. 748, s. 781. This was taken as undisputed law in the case referred to below.

[2] *Luddun Sahiba* v. *Mirza Kamar Kadar*, 8 Cal., 736 (1882); s.c., 11 C. L. R., 237. "A right to maintenance, depending upon the personal law of the individual, is a right capable of being enforced, and properly forms the subject of a

* 536 of the Code in force at the date of the ruling referred to.

suit in a civil case. But we think that this right, depending upon the personal law of the individual, is altogether different from the statutory right to maintenance given by s. 536 of the Code of Criminal Procedure, in which a person having sufficient means, neglects or refuses to maintain his wife."

It is here assumed that a *muta* wife (so called) is a wife within the meaning of the Code of Criminal Procedure, but it seems extremely doubtful, looking to the terms of the section in question, whether the Legislature could ever have contemplated its application to a woman who merely undertakes, in consideration of money paid or promised, to place herself at the disposal of a man for the purpose of sexual intercourse whenever required during a specified period of time neither binding herself to reside with him nor stipulating for the right to do so. The Sharái' ul Islam, in a passage omitted by Querry, but translated by Baillie, II, 344, distinctly declares that " the name of a *wife* does not in reality apply to a woman contracted in *moota*, and for the very convincing reason that if it did, she would be entitled to inherit from her husband, and he from her, under the words of the Koran, which is confessedly not the law " : but this passage does not appear to have been brought to the notice of the High Court.

[3] *Mahomed Abid Ali Kumar Kadar* v. *Luddun Sahiba*, 14 Cal., 276 (1886) cited as *Kamar Kadr* v. *Bibi Luddan* in Ameer Ali's Muhammadan Law, vol. i. p. 355. The parties were the same as in *Luddun Sahiba* v. *Mirza Kamar Kadar* and the facts were that in that case the magistrate had been directed by the High Court to determine whether Luddun Sahiba was the wife of the then respondent, the plaintiff in the subsequent case. The magistrate found that she was, by virtue of a *muta* contract which might or might not have been for fifty years as alleged by the lady, but which had certainly not yet expired. Thereupon the now plaintiff formally gave away in the Magistrate's Court, the unexpired term (if any remained, which he denied) and then sued in a Civil Court to have it declared that the relation of husband and wife had terminated and that she was no longer (if she ever had been) entitled to maintenance.

The case came before the High Court on second appeal, the lower appellate Court having held that, though the plaintiff could free the defendant from the obligation to yield him conjugal rights, and was never under the obligation to maintain or house her, still he could not shake himself free from the *vinculam matrimonii*. " She is still his wife until the term expires, or she herself snaps the fetter by emancipating herself from his power by ceasing to adhere to the term "—that is to say, so long as she lived a chaste life. (As to this, see s. 443 and note, *post*.) The High Court, however, decided, on the authority of the Sharái' ul Islam as reproduced in Part II of Baillie's Digest, p. 41, of the Tahrir ul Ahkam, as quoted by Shama Charan Sircar, in the Tagore Lectures for 1874, p. 375, and of a less-known work called the Sharh-i-Luma, that the effect of the giving-up of the unexpired term (though without the consent of the woman) was to put an end to the relation of husband and wife ; and though the judges did not see their way to restrain the magistrate by injunction from enforcing his maintenance-order, they intimated that he might be asked to abstain from giving any further effect to it in view of their decision, on the authority of *Abdur Rohoman* v. *Sakhina*, 5 Cal., 558 (1879), and *In re Abdul Ali Ismailji*, 7 Bom., 180 (1883).

The passage from the Sharh-i-Luma, which was considered to be the clearest of all those cited, is thus paraphrased in Ameer Ali's Muhammadan Law, vol. ii. p. 355.

" In order to effectuate a discharge or release the consent of the debtor is not necessary ; the wife in a *muta* marriage is only a debtor, the husband is the creditor, *ergo* the husband can ' give away ' the term or any portion of it without the wife's consent."

The learned author, who was counsel for the defendant in this case, has criticised the text and the judgment based on it somewhat severely, but he seems (if I may venture to say so) to have greatly misapprehended its scope and effect. "If," says he, "this argument be correct a man might induce a woman, of whose person he cannot otherwise possess himself, to enter into a *mutaa* marriage for a period of ninety-nine years, which is tantamount to a life-long contract, and, after satisfying his lust, throw her off at any time he likes by simply declaring that he has made 'a gift of the term.' The obvious answer is that, taking the law as it stands on the Muhammadan authorities, and as it would stand in India, but for one very questionable judicial construction of the Criminal Procedure Code, the woman has everything to gain and nothing to lose by her so-called husband taking the course suggested. She is released from a very onerous and degrading obligation, while retaining the only right she ever had under the contract, namely the right to dower—if not already paid.* The complication in this particular case arose from the fact of the Legislature having declared, or being supposed to have declared, that a woman who has bound herself by such a contract shall be entitled to an allowance in lieu of maintenance over and above the consideration actually bargained for, *so long as she remains bound by the contract*, thereby giving a bilateral character to what would otherwise have been a purely unilateral release.

Effect of giving away the unexpired term.

442. A man cannot, merely by giving away the unexpired portion of the term, deprive his *muta* wife of the whole or any part of her stipulated dower, which, if not already paid, can perhaps be claimed immediately on the release, and at all events on the expiration of the term originally stipulated.

In *Luddun Sahiba's* case, the wife's petition was not for dower, but for statutory maintenance, and the subsequent suit on the part of the husband was to have it declared that she had ceased to be his wife; but incidentally as bearing upon the nature of the "marriage" and his right to determine it, there were conflicting assertions as to the amount of dower agreed upon, which gave occasion to the following remarks by the Court (14 Cal., 284): "So far as we understand the authorities, the conditions of a *muta* marriage are these; a dower and a period of cohabitation are mutually agreed upon; the dower being fixed, the woman is at her husband's disposal for the term agreed on. If the marriage is not consummated, the woman is nevertheless entitled to half the dower, as it were by way of damages; but if the marriage is consummated she is entitled to the full dower, provided that, if cohabitation ceases through any fault on the part of the woman, the husband is entitled to make a proportionate deduction from the amount of the dower. But the husband, having paid or agreed to pay the dower, is not bound to cohabit with the wife for the stipulated term, or for any longer period than he thinks fit. He may release the woman from her liability at any time, though his liability for the dower will remain." And again at p. 287: "In respect of the amount of dower, we would observe that it was not what is known in the Mahomedan law as 'prompt,' and that, therefore any dispute regarding the amount of that dower or the payment of it in the present case would not affect the question connected with the dissolution of the marriage. It would be open to the woman, after such dissolution, to recover any amount of the dower which might remain unpaid from the husband in the

* See the next section.

same manner as any other debt due from him." The report leaves us in the dark as to the time when the dower was demandable under the contract, and therefore the words used by the Court throw no real light on the question whether if the contract had been for payment on expiration of the term, the release would have had the effect of accelerating it. On principle it would seem that it should. Any question of dower is ripe for settlement as soon as the marital relationship is at an end. The principal authority referred to was the passage thus rendered by Baillie, (II, 41). " If he were to make the woman a gift of the term [that is, waive the right to her altogether] * before coition, he would still be liable for half the dower; and if coition should have taken place, she is entitled to the whole dower, on condition of her keeping the term [or adhering to him till its completion]; * but if it is not completed he is entitled to deduct a proportionate part of the dower." It seems clear from the context that the last clause only conditions the words immediately preceding, and does not mean that if the husband voluntarily releases her she must still " adhere to him," in the sense of not contracting herself to any one else, in order to entitle herself to the full dower. In Querry's translation the sentence ending with the words " half the dower " is numbered as a separate paragraph from that which follows.

52.—**443.** (*Submitted.*) A *muta* wife does not forfeit her dower by infidelity. Infidelity of temporary wife.

I infer this not only from the silence of the books, but also from the fact that forfeiture of dower is not one of the consequences of unchastity even on the part of a permanent wife, whether Sunni or Shia. The passage above cited from Baillie, II, 41, might be regarded as an authority to the contrary, could we accept the gloss of the District Judge in *Luddun Sahiba's* case on Baillie's gloss on the original, whereby " keeping the term," or " adhering to the husband till the completion of the term," would be equivalent to " *leading a chaste life.*" But that is, as we have seen, and as the High Court saw, an impossible construction. Of course, if the Muhammadan criminal law were in force, the woman would incur punishment as for *zina;* not for a private wrong towards her husband but for a public wrong; in Muhammadan phrase, for infringing the rights of God, by indulging in carnal intercourse unsanctified by any recognised legal relation.

60.—**444.** It is said that a *muta* marriage does not admit of repudiation, unless perhaps in the form *zihar* (s. 75); but this seems to be a mere technicality without any substantial significance, the fact being that the *rights* of which a permanent wife is deprived by divorce never had any existence in the case of a *muta* wife, and that the only *duty* of which divorce would relieve her can be as effectually annulled by the husband " making a gift of the term." Repudiation.

Baillie, II, 43; Querry, I, p. 694, s. 409. As to the statement that *Zihar* may be exercised under this form of marriage, according to the opinion which is best founded on traditional authority, it would at most amount to this, that

* The words enclosed in brackets were admitted in the case last cited to be glosses of the translator.

if a Shia Moslem chooses to utter "injurious assimilations" with respect to his *muta* wife, this will justify her in refusing herself to him till he has performed penance. But it has been shown (under s. 75) to be very doubtful whether a Civil Court in British India possesses suitable machinery for dealing with either a plea or a suit founded on *zihar*.

Section 445 of the earlier editions has been omitted as it was a matter of speculation, and rested on no definite authority.

210, 211.—**446.** A *muta* marriage does not of itself give rise to any rights of inheritance as between the man and the woman; but such rights may, according to the better opinion, be expressly stipulated for. The children of such marriages are affiliated to both parents for inheritance and all other purposes.

Muta wife does not generally inherit; but the children do.

With respect to the children, ths Sharái' is not quite explicit; but the Tahrir ul Ahkam, as cited by Shamachurn Sircar in Tag. Lect. 1874, p. 380, states the law as above, and a plea to the contrary was abandoned before the Privy Council in *Baqar Ali Khan*, 25 All., 236 (1903).

Baillie, II, 44; Querry, I, p. 695, ss. 410-411.

PARENTAGE.

(IN CONTRAST WITH CHAPTER IV.)

81 (c).—**447.** The longest possible period of gestation is considered to be, not two years, but ten months.

Gestation.

Baillie, II, 90; Querry, I, p. 739, s. 710. But see under s. 81, *ante*, where it is shown to be doubtful whether the question is to be determined by Muhammadan Law or by the Indian Evidence Act.

89.—**448.** A distinction, unknown to the Sunni Law, appears to be drawn between a child of fornication (*walad uz zina*) and a child whose mother was a married woman at the time of his conception, but whose parentage has been formally disavowed by the woman's husband; only the latter being considered as related to his mother and his mother's relations, while the former is considered to have (legally speaking) no mother at all; except indeed in the sense that he is (if a male) prohibited from intermarrying with the woman who gave him birth, just as a female child born in the like unfortunate

Child of fornication distinguished from adulterine bastard.

circumstances would be prohibited from intermarrying with her real begetter, to whom she would, according to both sects, be for other purposes wholly unrelated.

Baillie, II, 14 and 303-305 ; Querry, I, p. 656, ss. 119, 120, and III, p. 365, s. 316. For the effect of these doctrines as regards inheritance, see s. 474, *post*.

GUARDIANSHIP.

(IN CONTRAST WITH CHAPTER V.)

93.—**449.** As in Shafei Law, no relative except a father or paternal grandfather has the power of contracting in marriage a boy or girl under the age of puberty. No agnatic guardianship for marriage.

Baillie, II, 6 ; and see *Badal Aurat*, 19 Cal., 79 (1891), at p. 82.

107.—**449A.** The legal custody (*hizanat*) of a boy belongs to the mother as against the father only until he is weaned not, as among Sunnis, until the completion of the seventh year. The custody of a girl belongs to the mother only until the completion of her seventh year, not, as among Sunnis, until she is of marriageable age.[1] Next after the mother, the father is under Shia Law the natural guardian, and it is only on his failure that the right passes to the maternal grandmother and other ascendants.[2] Hizanat.

[1] Baillie, II, 95 ; Querry, I, p. 746, s. 764.

In *Hosseini Begum*, 7 Cal., 434 (1881), the widow of a Shia was awarded the custody of her female children, aged respectively six and four years, as against the executors of her husband's will.

In *Lardli Begum* v. *Mahomed Amir Khan*, 14 Cal., 615 (1887), a Shia father was allowed the custody of a boy, aged eleven, and of a girl, aged seven, as against the mother who was living separately from him. It was expressly said, that if the girl had been under seven, her mother would have been entitled to the custody until she attained that age.

[2] *Salim-un-nissa*, 36 All., 466 (1914).

MAINTENANCE OF RELATIVES.

153.—**449B.** Where more than one individual is liable for the maintenance of relatives, the apportionment as between these

individuals seems to be governed by each individual's means and ability to pay, rather than by the proportion in which he would be entitled to inherit.

See the cases given in the *Jaini'-ush-Shittat*, as cited by Ameer Ali, Mahommedan Law, (1917), II, 487.

INHERITANCE.

(IN CONTRAST WITH CHAPTER VIII.)

239.—**450.** There is no separate class of successors corresponding to the "Distant Kindred" of Sunni Law. All successors by consanguinity are either Sharers or Residuaries, and the order of succession among Residuaries is independent of any distinction between male and female lines of descent, and is also independent of the sex of the actual claimants except as regards the proportion in which the inheritance is divided among males and females standing in the same degree of relationship to the deceased.

No "Distant Kindred."

Baillie, in the last chapter of Vol. II, of his Digest, purporting to be a translation of a MS. Digest, by Sir W. Jones, of extracts from the Mafatih and the Shar-áí'-ul-Islam, represents (p. 400) one Hoosim Zudád as saying, "I was directed to ask the Imam Jafer Sadik, on whom be peace, to whom doth the property of a person deceased of right appertain to his own nearest relation or to his *Asbat?* He replied: 'Verily it belongs to the nearest relation, and as to the *Asbat* or more distant male kindred, "Dust in their jaws." "The ultimate appeal is to the Koran, chap. xxxiii. "And those who are related by consanguinity shall be deemed the nearest-of-kin to each other preferably to strangers"—which passage, however, is far from being conclusive either way.

451. Successors by consanguinity, whether Sharers or Residuaries, are divided into three classes. Every member of the first class is preferred to any member of the second; and every member of the second is preferred to any member of the third class. These classes are respectively composed as follows:—

The three classes of successors.

I. Parents (not grand-parents) and descendants how low soever.[1]

II. Grand-parents how high soever, and brothers and sisters and their descendants how low soever.[2]

III. All other collateral relations.[3]

CIVIL SERVICE COMM.

[1] Baillie, II, 276; Querry, II, p. 342, s. 123.

[2] Baillie, II, 280; Querry, II, p. 346, s. 166, as explained and extended by s. 189, p. 350.

[3] Baillie, II, 285; Querry, II, pp. 351-354, ss. 203, 229.

210.—**452.** In working out the Koranic rules respecting the shares of husbands and wives, the Shias differ from the Hanafis in three points:— Husbands and wives.

(1) The "children" whose existence has the effect of reducing the share of the husband or wife, include descendants of either sex, tracing through females, as well as those tracing through males.[1]

(2) A childless widow takes no share in her husband's lands, though she is entitled to her Koranic share in the value of the buildings erected thereon, as well as in his movable property.[2]

228 (*Exception* and Note 3).—(3) The surplus does not "return" to the wife even where there are no other heirs, but passes by escheat in Shia theory to the Imam.[3]

[1] Baillie, II, 273; Querry, II, pp. 337, 338, ss. 92-93.

[2] Baillie, II, 295; Querry, II, p. 356, s. 242. *Sahebzadee Begum*, 14 W. R., 125 (1870); and *Umdutoonnissa* v. *Asloo*, 20 W. R., 297 (1873); *Umardaraz Ali Khan*, 19 All., 169 (1896); *Mir Alli Hussain*, 21 Mad., 27 (1897); *Aga Mahomed* 25 Cal., 9 (1897). In the last case it was unsuccessfully contended that the text from Baillie referred only to agricultural land, not to the sites of buildings.

In *Umatul Mahdi*, 35 Cal., 120 (1907), a childless widow belonging to the Shia sect, was deemed to have such possession as the Revenue Courts might properly recognise for the purpose of registration, although the land in question was agricultural, so that she had no title by inheritance, and the "lawfulness" of her possession (see s. 162) depended apparently on nothing but the bare fact of her being a creditor for unpaid dower.

[3] Baillie, II, 262, 339; Querry, II, p. 338, ss. 93-94. (In a footnote to the latter, "return" appears to be confused with "increase.") The husband takes the whole in default of other heirs, as by Hanafi Law.

Presumably, where the Imam inherits, his disposal of the property is by distribution to the poor. (see below, sec. 473A, and compare my note 1 to sec. 265 above).

N.B.—Here and elsewhere it should be borne in mind that a temporary wife does not inherit unless it is expressly so stipulated in the marriage-contract (s. 446).

225 and Note 2.—**453.** If the deceased, being a male, left more sons than one, the eldest takes as his special perquisite, before the division, the garments which the deceased was accustomed to wear, his signet ring, sword, and Koran, First class Privileges of the eldest son.

and on the other hand is solely responsible for any religious obligations, such as prayers, alms, and so forth, which the deceased may have left unperformed: provided that—

(1) He is of sound mind, and not judicially declared to be unfit for the management of affairs; and that—

(2) There exist other assets besides the articles aforesaid.

Baillie, II, 279; Querry, II, p. 345, ss. 159-162; Macn., p. 41.

226.—**454.** If there are no sons or daughters, the residue, after deducting the Koranic shares of the parents, and of the husband or wife or wives, if any, or the whole if there are no such Sharers, devolves upon the grand-children according to the principle of representation. That is to say—

Representation among grand-children.

(1) The children of a deceased daughter, instead of being postponed (as in Hanafi Law) to all agnatie relations, however remote, take among them the share that their mother would have taken, which may be, according to circumstances, one-half or a fraction of two-thirds, or the portion belonging to her as a Residuary in competition with a son or sons according to the rule of the double share to the male.

(2) The daughter of a deceased son, who is treated in Hanafi Law as a quasi-daughter, being either Sharer or Residuary according as there are, or are not, male descendants of the deceased in the same or a lower degree, by Shia Law simply takes, or shares with other children of the same deceased son, the share which would have been assigned to the latter.

(3) As between sons, or sons and daughters, of different deceased sons, the distribution is according to the stocks, not (as in Hanafi Law) according to the individuals, the children of each son having the exclusive right to what their father would have taken, and the rule of the double share to the male applying only as between sons and daughters of the same son.

Baillie, II, 278; Querry, II, p. 344, ss. 150, 154, 158; Macn., 34-35.

226.—**455.** If there are no descendants in the first or second degree, the whole, or the residue as the case may be, is divided among the descendants in the third degree on the same principle, and so with all remoter degrees. Remoter descendants.

Querry, as above, ss. 152-153; Baillie, as above.

456. The "share," technically so called, of the father is the same as by Sunni Law, namely, one-sixth; but his rights as Residuary are inferior in the following respects, namely:— Father as Residuary.

228.—(1) He can take nothing in that capacity if there are any descendants, of either sex or in either the male or the female line.[1]

215 (*b*).—(2) Whereas by Hanafi Law, if the inheritors are the two parents and a husband or wife, the "third" assigned by the Koran to the mother is not a third of the whole property, but only *a third of what remains after deducting the husband's or wife's share*, that is, either one-sixth or one-fourth, thereby leaving to the father the residuary share, either one-third or one-half; the Shias construe the text literally as giving to the mother one-third *of the whole property*, thus leaving to the father only his ordinary share of one-sixth in the former case, and only five-twelfths in the latter case.[2]

215 (*a*).—(3) Whereas the Hanafis allow the existence of two sisters, or of a brother and sister, full, consanguine, or uterine, to reduce the mother's share, as against the father, to one-sixth, leaving to the father five-sixths, the Shias require for this purpose either two brothers, or one brother and two sisters, or four sisters, either full or consanguine.[3]

[1] Baillie, II, 271, 273, 276, 381; Querry, II, p. 337, s. 89; p. 339, s. 109; p. 342, s. 133. As to the father's extra rights as Sharer, see ss. 458-459.

[2] Baillie, II, 273, 274, 276, 383; Querry, II, p. 339, s. 108; p. 340, s. 119.

[3] Baillie, II, 272, 273, 365; Querry, II, p. 338, ss. 95, 99.

238.—**457.** Whereas by Hanafi Law the principle of the "Return" only applies where there is a surplus remaining after setting apart the fractions regularly belonging to all the unexcluded Sharers, *and there are no residuaries*, it applies by Shia Law in favour of Sharers belonging to the first class of successors by consanguinity, notwithstanding the existence of Residuaries of the second or third class; and in favour of Sharers belonging to the second class notwithstanding the existence of Residuaries of the third class.

Application of the "Return."

Illustrations.

(*a*) A Shia dies leaving a mother, a daughter, and a brother.

By Hanafi Law the distribution would be :—

Mother, $\frac{1}{6}$

Daughter, $\frac{1}{2} = \frac{3}{6}$

Brother, $\frac{1}{2} = \frac{3}{6}$

By Shia Law the brother will take nothing, and the whole will be divided between the mother and the daughter in the proportion of their original shares, that is :—

Mother, $\frac{1}{4}$; daughter, $\frac{3}{4}$

(*b*) The surviving relatives are, father, mother, daughter, brother.

Here the brother would take nothing by either law, being excluded by both the father and the daughter. But whereas, by Hanafi Law, the distribution would be :—

Mother, $\frac{1}{6}$

Daughter, $\frac{1}{2}$

Father, $\frac{1}{3}$, he taking $\frac{1}{6}$ as Sharer and the remaining $\frac{1}{6}$ as Residuary,

By Shia Law the distribution will be, in the first instance :

Mother, $\frac{1}{6}$

Father, $\frac{1}{6}$

Daughter, $\frac{1}{2}$

and the remaining sixth will be divided among all three in the proportion of their original shares, making the ultimate distribution :—

Mother, $\frac{1}{6}$

Father, $\frac{1}{6}$

Daughter, $\frac{3}{6}$

(*c*) The surviving relatives are, wife, mother, daughter, sister. Here, by Hanafi Law, the sister would be considered as a Residuary, so that there would be no room for the Return, but by Shia Law the sister will be excluded altogether; and inasmuch as the wife can take nothing by Return according to either law, the distribution will be :—

Wife, $\frac{1}{8} = \frac{4}{32}$.

Mother, $\frac{1}{4}$ of $\frac{7}{8} = \frac{7}{32}$.

Daughter, $\frac{3}{4}$ of $\frac{7}{8} = \frac{21}{32}$.

(*d*) The surviving relatives are a sister (full, uterine, or consanguine) and a paternal uncle. Here the sister will take the whole, whereas by Hanafi Law, she would only take her Koranic share, namely, $\frac{1}{2}$ in the case of the full or consanguine, and $\frac{1}{6}$ in the case of the uterine sister, leaving the residue to the uncle.

Baillie, II, 262, and 398–403*; Querry, II, p. 327, ss. 12, 15; p. 341, s. 120. The first three illustrations represent examples to be found in the above, only adding in each case a brother or sister by way of drawing attention to their

* In the last chapter, which does not, like the rest of the volume, represent the Sharâi' ul Islam, but two other works of less note.

exclusion. The first illustration also represents the facts adjudicated upon in *Rajah Deedar Hossein*, 2 Moo. I. A., 441 (1841), which is the leading case for the application of the Shia Law to Shias in British India; see especially pp. 474 and 477. For illustration (*d*), see Baillie, 262. We shall see presently that the Return may operate also to the exclusion of a consanguine brother.

214, 215.—**458.** The mother is in one case excluded from participating in the Return; namely, if there be, together with herself, the father, and one daughter, also two or more full or consanguine brothers, or one such brother with two or more such sisters, or four sisters. Here the existence of the "brethren," though themselves excluded, prevents the mother from taking more than her minimum share of one-sixth, and the Return will be shared between the father and the daughter; so that the entire distribution will be:— Mother when excluded from the Return.

Mother, $\frac{1}{6} = \frac{4}{24}$.
Father, $\frac{1}{4}$ of $\frac{5}{6} = \frac{5}{24}$.
Daughter, $\frac{3}{4}$ of $\frac{5}{6} = \frac{15}{24}$.

Baillie, II, 272, 365, 380; Querry, II, p. 343, s. 136. The rule is no doubt based on the text of the Koran, iv. 11; "and if he have brethren, his mother shall have a sixth part"; but that text was connected by the Hanafi lawyers with the preceding sentence, so as to make it applicable only to the estate of a childless person, and their mode of dealing with such a case as the present was to say that neither parent could, *as Sharer*, take more than $\frac{1}{6}$, but that the father would take the remainder as *Residuary*, so that there would be no question of Return, and the daughter would have only $\frac{1}{2}$ instead of $\frac{5}{6}$. By Shia Law, the existence of a daughter prevents him from taking as a Residuary (s. 456 (1), but this rule somewhat improves his position as Sharer.

222.—**459.** The Hanafi doctrine of the "Increase" has no place in the Shia Law. In other words, where the sum of the portions which would regularly accrue to different persons as "Sharers" exceeds unity, they do not abate rateably, but rules are laid down for determining which of them shall bear the whole loss. No "Increase."

The rule which covers all cases that can arise among successors of the first class is, that daughters must bear the loss in exoneration of either parent or either spouse.

Illustrations.

(*a*) The competing Sharers being father, mother, husband, and one daughter making the sum of the original fractions

$$\frac{1}{6} + \frac{1}{6} + \frac{1}{4} + \frac{1}{2} = \frac{2}{12} + \frac{2}{12} + \frac{3}{12} + \frac{6}{12} = \frac{13}{12},$$

the two parents and the husband will take their full shares, leaving only $\frac{6}{12}$ for the daughter, instead of the $\frac{6}{13}$ which she would obtain by the Increase.

(*b*) The case being the same except that there are two or more daughters, their original collective share would be $\frac{2}{3} = \frac{8}{12}$, but it will be reduced, as before, to $\frac{5}{12}$, giving each daughter only $\frac{6}{24}$ or less.

(*c*) The competing Sharers being father, mother, wife, and two or more daughters, making the sum of the original fractions

$$\frac{1}{6} + \frac{1}{6} + \frac{1}{8} + \frac{2}{3} = \frac{4}{24} + \frac{4}{24} + \frac{3}{24} + \frac{16}{24} = \frac{27}{24},$$

the collective share of the daughters will be reduced to $\frac{24 \cdot 11}{24} = \frac{18}{24}$.

Baillie, II, 263, 274,* 316; Querry, II, p. 341, s. 121†; p. 343, ss. 137, 143. The rule here laid down will not seem unreasonable, if we remember that the shares of the mother and husband, or wife, have been already reduced to one-half of their maximum amounts owing to the existence of the daughter or daughters, and that the same cause has deprived the father of the right that he would otherwise have had as Residuary to anything that might remain after deducting the other shares.

"This principle is established by the unanimous assent of all our doctors, to whom God be gracious, following the express conditions of our holy Imams, upon whom be the blessing of God, in such a manner as to render its belief and practice one of the essentials of our religion; whilst the uniform doctrines of the vulgar sect [*i.e.*, the Sunnis] have instituted and supported the practice of *aul;* that is, increasing the division, or number of shares, and thereby proportionately diminishing the value of all in cases of defalcation in the estate. . . . From our pure and holy Imams, however, upon whom be the peace and blessing of God, there are innumerable traditions recorded and generally known, which expressly annul and prohibit this practice, and in which they not only in the strongest terms deny its validity, but also prove in the most satisfactory manner the perverseness of those doctors of the vulgar sect, who recommended it and applied it." Baillie, II, 397 (in the supplementary chapter, taken from Sir William Jones's Digest).

It is rather singular that this doctrine, so vehemently scouted by the Shias, should be attributed by the Sunnis to Ali, the primary Shia authority; see under s. 222, *ante.*

Second and third classes. Saving of rights of husband and wife.

460. All rights of successors by consanguinity of the second or third class, as declared in the next fourteen sections, must be understood to be subject, as in Hanafi Law, to deduction of the full shares of husband or wife, that is of one-half for the husband and of one-fourth for the wife or wives.

Baillie, II, 338; Querry, II, p. 348, s. 183; p. 354, s. 227.

Representation.

461. In the second and third classes, as, in the first the distribution among Residuaries standing in the same degree of proximity to the deceased is governed by the principle of representation. The applications of this principle are shown in ss. 462, 463, 466, 470, 473.

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* In the last chapter, which does not, like the rest of the volume, represent the Sharàì'ul Islam, but two other works of less note.

† In this passage of the Sharái' the father is erroneously mentioned as one of those on whom the deficiency falls. The error is silently corrected by the author of the Sharàì' himself when he comes to deal with the specific cases.

228, 229, 246.—**462.** If the deceased left all his four grand-parents surviving, but no brothers or sisters, or descendants of brothers or sisters, the whole property devolves upon the grand-parents, as against any Residuaries of the third class, two-thirds of it going to the paternal and one-third to the maternal side. Then the portion assigned to the paternal side is again divided in the same proportion between the grand-parents on that side, but the maternal grand-parents divide their portion equally. In other words the distribution is— Distribution among grand-parents.

Father's father, $\frac{2}{3}$ of $\frac{2}{3} = \frac{4}{9} = \frac{8}{18}$.

Father's mother, $\frac{1}{3}$ of $\frac{2}{3} = \frac{2}{9} = \frac{4}{18}$.

Mother's father, $\frac{1}{2}$ of $\frac{1}{3} = \frac{1}{6} = \frac{3}{18}$.

Mother's mother, $\frac{1}{2}$ of $\frac{1}{3} = \frac{1}{6} = \frac{3}{18}$.

If there is only one paternal, or only one maternal grand-parent on either side, he or she takes the whole fraction allotted to that side, to the exclusion of the grand-parents or grand-parent on the other side; and if there is only one grand-parent surviving, he or she takes the whole.

Ballie, II, 281; Querry, II, p. 348, s. 180.

219, 247.—**463.** If there are no grand-parents, and no brothers or sisters, or descendants of such, the property will devolve upon the great-grand-parents, or in default of such upon the ancestors in the next degree above them, and so on high howsoever (supposing the survival of higher ancestors to be physically possible); the distribution among ancestors in the same degree being governed in each case by the principles stated in the preceding section. Remoter ancestors.

Illustration.

Suppose (of course a most unlikely supposition) the nearest surviving relatives to be the eight great-grandparents of the deceased. The distribution will be as follows:—

Father's ancestors . . $\frac{2}{3}$ { FFF*, FFM } $\frac{2}{3}$ of $\frac{2}{3} = \frac{4}{9}$; { FFF $\frac{2}{3}$ of $\frac{4}{9} = \frac{8}{27} = \frac{32}{108}$; FFM $\frac{1}{3}$ of $\frac{4}{9} = \frac{4}{27} = \frac{16}{108}$ }

{ FMF, FMM } $\frac{1}{3}$ of $\frac{2}{3} = \frac{2}{9}$; each $\frac{1}{2}$ of $\frac{2}{9} = \frac{1}{9} = \{ \frac{12}{108}, \frac{12}{108} \}$

Mother's ancestors . . . . $\frac{1}{3}$ { MFF, MFM, MMF, MMM } each $\frac{1}{4}$ of $\frac{1}{3} = \frac{13}{12} = \frac{9}{108}$

* In these combinations of letters, F stands for father, M for mother.

Baillie, II, 283; Querry, II, p. 349, s. 187, where the paternal and maternal portions are reversed—evidently by oversight—and it is wrongly stated that the two males on the father's side take twice as much as the two females.

Brothers and sisters without grandparents.

221, 231, 232.—**464.** If the deceased left no ancestors, but brothers and sisters of various kinds, full, consanguine, and uterine, the distribution among these will be the same as in Hanafi Law; that is to say, those of the full blood will entirely exclude the consanguine, while the uterine brothers or sisters will take, if more than one, one-third, as against either the full or the consanguine, and if there be only one brother or sister, he or she will take one-sixth. The distribution among brothers and sisters who are all of the full-blood or all consanguine will be according to the rule of the double share to the male; but uterine brothers and sisters will share equally.

Baillie, II, 280; Querry, II, p. 347, ss. 168, 169, 172, 176. This section is only inserted to connect what precedes and follows.

Rights of brotherless sisters.

232.—**465.** Full sisters without full brothers take not only their Koranic share as against consanguine brothers and sisters, but also the remainder by Return. As against uterine brothers or sisters, full sisters take the whole Return, leaving to the uterines only their Koranic share; but failing full sisters, consanguine sisters and uterines divide the Return in proportion to their shares. As in Hanafi law, a sister of any kind, or a uterine brother, will take the whole as against children of deceased brothers and sisters.

Illustrations.

(*a*) Nearest surviving relatives, a full sister and a consanguine brother.

Here by Hanafi Law the sister would take half as Sharer, and the brother the other half as Residuary; but by Shia Law the sister takes the whole.

(*b*) Two full sisters, a consanguine brother and a consanguine sister.

Here by Hanafi Law the full sisters would take $\frac{2}{3}$ between them, and the residue would be divided between the consanguine brother and the consanguine sister in the proportion of two to one. By Shia Law the full sisters take the whole between them.

(*c*) One full sister, one consanguine sister, and a brother's son.

Here by Hanafi Law the full sister would take $\frac{1}{2}$, the consanguine sister $\frac{1}{6}$, and the brother's son the remaining $\frac{1}{3}$. By Shia Law the full sister takes the whole.

(*d*) Consanguine sister, uterine brother and sister, brother's son.

Here by Hanafi Law the consanguine sister would take $\frac{1}{2}$, the uterine brother and sister $\frac{1}{6}$, each, and the brother's son the remaining $\frac{1}{6}$. By Shia Law the brother's son gets nothing, the uterine brother and sister primarily $\frac{1}{6}$ each, and the consanguine sister primarily $\frac{1}{2}$; then the surplus of $\frac{1}{6}$ is divided among them in the same proportion, so that the consanguine sister gets ultimately $\frac{3}{5}$, and the uterines each $\frac{1}{5}$.

Querry II, p. 347, ss. 170, 171, 173, 174, 176, 185, 188; Baillie, II, 280, 281, 282, 332, 335. As regards illustration (*d*), some Shia lawyers maintained that in such a case the consangnguine sister should take the whole Return like a full sister, taking therefore $\frac{2}{3}$, instead of $\frac{3}{5}$, or, as against a single uterine brother or sister, $\frac{5}{8}$; and they cited a tradition to this effect from the fifth Imam, Muhammad Bakir; but the author of the Sharái' considers that this report is weak, and that the opinion stated above is to be preferred—why, it is difficult to say.

Even in denying to the brother's son the residuary right which he would have had by Hanafi Law, the Shia authorities were not absolutely unanimous.

234.—**466.** If there are no brothers or sisters of any kind, children of deceased brothers or sisters stand in the place of their respective parents.

Nephews and nieces, *per stirpes*.

Illustrations.

(*a*) The nearest degree of surviving relatives consists of :—

Two sons and a daughter of a deceased full brother, B^1;
A daughter of another deceased full brother, B^2;
A son of a deceased consanguine brother, C.B.; and
A son and a daughter of a uterine brother, U.B.

The portions of the deceased relatives would have been :—

U.B., $\frac{1}{6}$ as Sharer; B^1 and B^2, each $\frac{5}{12}$ as Residuary; C.B., O.

The shares of the surviving relatives therefore are :—

Son and daughter of U.B., each $\frac{1}{12}$;
Sons of B^1, each $\frac{2}{5}$ of $\frac{5}{12} = \frac{1}{6}$; daughter of B^1, $\frac{1}{5}$ of $\frac{5}{12} = \frac{1}{12}$;
Daughter of B^2, $\frac{5}{12}$
Son of C.B., O.

(*b*) Full sister's son, three daughters of different uterine brothers.

Here the share of the full sister would have been primarily $\frac{1}{2}$, and the collective share of the three uterine brothers, $\frac{1}{3}$; but the full sister would have taken the surplus by Return. Hence the distribution will be :—

Sister's son, $\frac{2}{3}$
Daughters of uterine brothers, each, $\frac{1}{3}$ of $\frac{1}{3} = \frac{1}{9}$.*

(*c*) The same, substituting a consanguine sister's son for a full sister's son.

According to the opinion preferred by the author of the Sharái', the consanguine sister and uterine brother would have shared the Return in the proportions of their original shares, and therefore their respective children will do the same. The distribution will therefore be :—

C. sister's son, $\frac{3}{5}$; daughters of U. brothers, each, $\frac{1}{3}$ of $\frac{2}{5} = \frac{2}{15}$

Baillie, II, 284; Querry, II, p. 350, ss. 189, 201.

467. When there are grandparents or remoter ancestors on the one hand, and brothers or sisters, or both, or descendants of brothers or sisters, on the other hand, those in the nearest degree, whichever that may happen to be, of the one class share with those in the nearest degree of the other class.

Nearest ancestors share with nearest descendants of the parents.

* The result would have been the same if all three had been daughters of the same U. brother (or U. sister); but if two of them had been daughters of the same U. brother, and the third of a different U. brother, the latter would have taken $\frac{1}{6}$, leaving only $\frac{1}{12}$ for each of the others.

Illustrations.

(*a*) Grandparents do not exclude, but share together with, the children of brothers or sisters, should there happen to be no living brother or sister surviving.

(*b*) Brothers and sisters do not exclude, but share together with, great-grandparents, should there happen to be no grandparent surviving.

Baillie, II, 282; Querry, II, pp. 349–350, ss. 186, 189, 202.

Principles of distribution in such cases.

468. When ancestors inherit together with brothers and sisters or their descendants, the distribution is governed by the following rules :—

(1) A paternal grandfather counts as a full or consanguine brother, and a paternal grandmother as a full or consanguine sister.

(2) A maternal grandfather or grandmother counts as a uterine brother or uterine sister.

(3) Remoter ancestors stand in the place of the grandparents through whom they are respectively connected with the deceased, as descendants of brothers or sisters stand in the place of their respective parents.

Baillie, II, 281; Querry, II, p. 348, ss. 181, 182.

237, 258, 261.—**469.** If there are no successors by consanguinity of the first or second class, the whole property (*minus* the share of the husband or wife, if any) devolves in the first instance upon the uncles and aunts, all of whom, whether paternal or maternal, and whether of the whole or of the half blood, are *with one exception*, preferred to cousins of the deceased.

Third Class.—Uncles and aunts.

Exception. The son of a full paternal uncle is preferred to, and totally excludes, a consanguine paternal uncle. "But if the case is changed, even by the addition of a maternal uncle, the son of the paternal uncle is excluded."

Baillie, II, 285, 329; Querry, II, p. 351, s. 203, and p. 352, s. 210.

The historical reason for this singular exception to the otherwise universal rule that, within the same class the nearer degree excludes the more remote, is very frankly avowed by the Shia authorities, namely, that Ali was the son of Abu Taleb, who was a full paternal uncle of the Prophet, whereas Abbas was only a consanguine paternal uncle. It was important for the Shias to make out not only that the lineal descendants of the Prophet through Fatima were nearer heirs than any collaterals, but also that Ali himself was the nearest male heir of

full age at the time of the Prophet's death, and as such ought to have succeeded him at once if the Caliphate was, as they contended, a matter of inheritance.

The passage quoted above leaves a good deal unexplained. One would like to know (1) whether the maternal uncle must be of the full blood; (2) whether he excludes both the son of the paternal uncle and the consanguine paternal uncle, or whether the fact of his co-existence lets in the latter to share with him, in accordance with s. 470; and (3) whether a maternal aunt would do as well as a maternal uncle. I should be inclined to answer the first and last of these questions in the affirmative, so to the second, the wording seems to imply that the maternal uncle would share with the consanguine paternal uncle.

470. The first step in the distribution among uncles and aunts of different kinds is to assign two-thirds of the property to the paternal and one-third to the maternal side. The existence of even a single person on the paternal or the maternal side, as the case may be, whether male or female, and whether full, consanguine, or uterine, will exclude from the share assigned to that side every person belonging to the other side.

Paternal and maternal sides.

Illustration.

The surviving relatives are, consanguine paternal uncle, full maternal aunt. The former will take $\frac{2}{3}$, the latter $\frac{1}{3}$; though, had the two claimants been both on the paternal, or both on the maternal side, the aunt of the whole blood would have excluded the consanguine uncle. (See sec. 471 below).

Baillie, II, 286, 334; Querry, II, p. 352, s. 216.

The Hanafi rule is the same so far as "Distant Kindred" are concerned (s. 258), *e. g.*, as between consanguine paternal aunt and full maternal aunt; but is that system the consanguine paternal uncle would belong to a higher order altogether, as being a Residuary.

471. In case of competition between aunts and uncles of different kinds on the same side, the portion assigned to that side ($\frac{2}{3}$ or $\frac{1}{3}$ of the whole, as the case may be) is dealt with on the same principle as if the competition had been between brothers and sisters of the *propositus* himself (s. 464), instead of being between the brothers and sisters of his father or of his mother. That is to say, full brothers and sisters of the parent in question exclude consanguine brothers and sisters of the same parent, and uterine brothers and sisters of the parent in question take collectively $\frac{1}{3}$ of that parent's share, or if there be only one such brother or sister, he or she takes a sixth, as against either full or consanguine competitors on the same side; but even uterine uncles and aunts

Full blood preferred to consanguine, and these to uterine relations on the same side.

take the whole share of their side as against uncles and aunts on the other side, or as against any remoter kindred.

Illustrations.

(*a*) The avuncular relatives on the paternal side are, a full paternal uncle, a full paternal aunt, a consanguine paternal uncle, two uterine paternal uncles and a uterine paternal aunt. On the other side there is only a uterine maternal aunt.

The distribution will be as follows :—

Full paternal uncle, $\frac{2}{3}$ of $\frac{2}{3}$ of $\frac{2}{3} = \frac{8}{27}$

Full paternal aunt, $\frac{1}{3}$ of $\frac{2}{3}$ of $\frac{2}{3} = \frac{4}{27}$

Consanguine paternal uncle, 0,

Uterine paternal uncles, each, $\frac{1}{3}$ of $\frac{1}{3}$ of $\frac{2}{3} = \frac{2}{27}$: together

Uterine paternal aunt, the same, $\frac{2}{27}$

Uterine maternal aunt, $\frac{1}{3} = \frac{9}{27}$.

$$\frac{8+4+4+2+9}{27} = \frac{27}{27} = 1$$

(*b*) The relatives in question are, a consanguine paternal uncle, a uterine paternal uncle, a full maternal aunt, a consanguine maternal uncle, and a uterine maternal uncle.

The distribution will be :—

Consanguine paternal uncle, $\frac{5}{6}$ of $\frac{2}{3} = \frac{10}{18} = \frac{5}{9}$

Uterine paternal uncle, $\frac{1}{6}$ of $\frac{2}{3} = \frac{2}{18} = \frac{1}{9}$

Full maternal aunt, $\frac{5}{6} \times \frac{1}{3} = \frac{5}{18}$

Consanguine maternal uncle, 0,

Uterine maternal uncle, $\frac{1}{6} \times \frac{1}{3} = \frac{1}{18}$

$$\frac{10+2+5+1}{18} = \frac{18}{18} = 1$$

Baillie, II, pp. 285, 286, 329 ; Querry, II, pp. 351-353, ss. 207, 208, 209, 214-218 (in which section " l'oncle paternel utérin " is evidently a misprint for " l'oncle *maternel* utérin "), 219.

260.—**472.** Among uncles and aunts, the rule of the double share to the male applies only on the paternal side, and even there only to those of the full blood and to the consanguine. Maternal aunts share equally with maternal uncles of the same kind, whatever that kind may be, and so do uterine paternal aunts with uterine paternal uncles.

Male and female share equally on the maternal side, and also uterine uncle and aunt on the paternal side.

268.—**473.** After uncles and aunts come the successive degrees of their descendants, the distribution in each degree being governed by the principle of representation ; and after descendants of uncles and aunts come great-uncles and great-aunts how high soever, the respective descendants of each branch being exhausted before going back to a higher branch, and the distribution in each degree being governed by the principles already explained.

Remoter collaterals.

Baillie, II, 287 ; Querry, II, p. 353, ss. 221-224.

265.—**473A.** There is no final escheat to a Bait-ul-Mál where a deceased person leaves no possible heir, his property, is liquidated by the Mujtahid as representing the Imam the proceeds to be distributed among the poor of the city in which the deceased was born [or presumably, where that is impracticable, where he died].

No escheat to Bait-ul-Mál.

Jámi-ush-Shittát, Book on Inheritance, as quoted by Ameer Ali., M. L. Ed. 1917, II, 11.

266.—**474.** An illegitimate child (that is, one neither proved to have been conceived in wedlock nor legitimated by acknowledgment) does not, as in Sunni Law, inherit from his mother or his mother's relations, nor do they inherit from him. The only persons who can inherit from him, or from whom he can inherit, are his own wives and descendants.[1]

Illegitimate child is not counted as the son of his mother.

But with respect to a " child of imprecation "—that is, a child confessedly conceived during wedlock but repudiated with a solemn oath by the mother's husband—the Shia Law is the same as the Sunni, namely, that for inheritance and other purposes he is still considered to be the son of his mother.[2]

Exception.

[1] Baillie, II, 305 ; Querry, II, p. 365, ss. 316, 317, 318. In section 319 it is stated that there is a tradition assimililating the Shia to the Sunni Law on this point, but that it is generally rejected ; and it was held accordingly in *Sahebzadee Begum*, 12 W. R., 512 (1869) ; s.c. on review, 14 W. R., 125 (1870).

[2] Baillie, II, 157 : " The child is cut off from the man, but not from the woman." The fuller discussion of this subject in that part of the Shar-ái' which treats of inheritance is omitted by Baillie, but reproduced by Querry, II, p. 363, ss. 301-315. In s. 302 it is stated as the more general opinion that if the disowned child leaves no other heir the mother takes not only her Koranic third, but also the remainder by Return, as she would in the ordinary case of a fatherless child.

267.—**475.** A person is not excluded from the inheritance of one whose death he has caused, unless he caused it intentionally.

Unintentional homicide does not exclude.

Baillie, II, 369 ; Querry, II, p. 332, s. 40.

WILLS.

(IN CONTRAST WITH CHAPTER IX.)

As to heirs consenting beforehand to a bequest.

270.—**476.** A bequest exceeding one-third of the net assets may be rendered valid by consent of the inheritors whose rights would be infringed thereby, even though such consent was given in the lifetime of the testator, and not ratified after his death.

Baillie, II, 233; Querry I, p. 613, s. 35. The latter translation gives a wrong impression of the meaning of the Shar-ái,' which clearly is that the more widespread of the two conflicting opinions mentioned is that in the text.

A bequest to an heir exceeding the legal third cannot, of course, be on a better footing than a similar bequest to a stranger, which according to both sects holds good to the extent of the third, but is void as to the excess unless ratified by the heirs; and there is nothing in the Shar-ái' to indicate that it will be on a worse footing *except where it involves the total exclusion of one or more of the testator's children from the succession.* As to this exceptional case the Shar-ái' (Baillie, II, 238) mentions two opinions: (1) "that it is quite futile and of no efficacy whatever"; (2) that it holds good as to one-third, just as if the testator had bequeathed the whole of his property to a stranger; but the writer goes on to say that "the first opinion appears to be better founded in law, though the other is supported by a tradition which is now rejected." Accordingly in *Fahmida Khanum*, 30 All., 153 (1908), where a Shia Muhammadan had bequeathed the whole of his estate to one of his two daughters to the exclusion of the other, the Court gave the excluded daughter a decree, not for one-third, but for the full half to which she would have become entitled on intestacy.

The decision itself is doubtless correct; but the same can hardly be said of the remark (extra-judicial, though embodied in the reporter's headnote), that the invalidity could not have been cured by consent of the excluded heiress, *unless given after the death of the testator.* The only authorities cited in support of that remark were a recent treatise on *Hanafi Law*, and three rulings, *all purporting to be based on that law* (though it is true that in the last of them the parties were in fact Shias); whereas the efficacy of consent given in the tesator's lifetime is precisely one of the points on which the Shia law is confessedly different.

As to fractional bequests collectively exceeding the legal third.

270.—**477.** Bequests to different persons of fractions of the estate which in the aggregate exceed the legal third, do not, as in Hanafi Law, abate rateably failing consent of heirs, but take effect or fail according to their priority in point of time (or, presumably, in the case of a single written will, according to the order in which they are set down therein). There is, however, an exception to this rule in the case of successive bequests of the *exact third* to two different persons, the later bequest being here considered to be a revocation of the earlier.

Baillie, II, p. 235; Querry, I, p. 615, ss. 45, 46, wrongly represents the decision as being in favour of the first legatee in both cases. The latter portion of s. 271 of this Digest holds good equally in Shia Law.

272.—**478.** A bequest to an heir (not exceeding the legal third) does not require the assent of the other heirs, either before or after the death of the testator, to render it valid. Bequests to heir.

Baillie, II, 244; Querry, I, p. 623, s. 108. The Shia view is certainly the most easy to reconcile with the text of the Koran (II, 180), which recommends the believer to "bequeath a legacy to his parents and kindred, in reason." For the Sunni explanations, see my note to s. 272, *ante*. In *Nawab Umjad Ally Khan*, 11 Moo. I. A., 517 (1869), the existence of this difference between the systems was treated as doubtful, though the view taken by the P. C. of the facts rendered it unnecessary to argue the point. This, however, was just before the publication of Baillie's translation of the Shar-ái' which places the matter beyond dispute. In *Salebhai Abdul Kader*, 36 Bom., 111 (1911), a Shia case, the assent of all the other heir was tacitly assumed to be necessary to the validity of a legacy to an heir; the difference between Shia and Sunni law on this point was not brought to the notice of the Court.

275.—**478A.** A bequest is (probably) not rendered void by the fact of the legatee having unintentionally caused the death of the testator. Effect on bequest of homicide and suicide.

This may be inferred from the silence of the Shar-ái' coupled with its express statement (noted above, s. 475) as to the analogous case of inheritance. Apart from this analogy there is nothing to show that a legacy is forfeited even by intentional homicide.

284.—**479.** The rule assimilating death-bed gifts to bequests only applies to diseases in the ordinary sense of the term not including the danger of a woman in child-birth, still less such dangers as an impending battle or a storm at sea.[1] A disease of more than a year's duration is not considered a death-illness. But if the disease increases in intensity, or another supervenes, so as to cause an apprehension of death in the donor's mind, the increase or new disease is a death-illness.[2] Death-bed gifts.

[1] Baillie, II, p. 257; Querry, I, p. 636, s. 193.

[2] *Khurshed Husain*, 36 All., 287 (1914).

294.—**480.** A legacy to a person who dies before the testator passes to the heirs, if any, of that person unless the testator has thought fit to revoke it. Legatee predeceasing testator.

Baillie, II, 247; Querry, I, p. 616, s. 126. In both translations this view is stated to be in accordance with the more authentic of two conflicting traditions, though in Querry's, which seems here to be the more literal, it is prefaced by what reads like a positive statement that such a legacy lapses, which is the Hanafi rule, and is in harmony with the English Law and the Indian Succession Act, s. 92.

Will by a suicide, when valid.

480A. If a person wounds himself mortally and then makes a will, his bequest will not be valid; otherwise, if he first makes the will and then commits suicide.

Baillie, II, 232; Querry, I, p. 612, ss. 24, 25; *Mazhar Husen*, 21 All., 91 (1898), where a will written immediately before, and disclosing the intention of committing suicide by poison, was held valid.

This would be the place to notice, supposing it to be binding in British India, the peculiar rule of Shia Law that when a boy has attained the age of ten "all proper bequests made by him in favour of relatives and others are lawful, *if he is capable of discernment*" (Baillie as above); whereas the Hanafis draw the line at the age of puberty. It is probable, however, that both rules would be held to be superseded by the Indian Majority Act, 1875; see s. 280, *ante*. [Even the Shias do not allow *wakf* until the grantor has attained at least the age of puberty; Baillie, II, 214.]

GIFTS.

(IN CONTRAST WITH CHAPTER X.)

Gift of Mushaa and gift to two persons jointly, valid.

380, 312.—**481.** A gift of an undivided share in property capable of partition is valid; and so is a gift to two persons jointly, whether or not the conditions imposed by Hanafi law are satisfied.

Baillie, II, 204-5; Querry, I, p. 597, ss. 16, 17; and see, as to the first point, *Haji Kalub Hossein*, 4 N. W., 155 (1872).

313.—**481A.** The gift of a life-estate or of limited interest is recognised.

Baillie, II. 226, Ameer Ali, I, 79 *seq.* (Ed. 1904), again at II. 112 *seq.*, citing the *Jawahir-ul-Kalám*. See also *Banoo Begam*, 32 Bom., 172 (1907).

Revocation of gifts.

316.—**482.** The Shia rules as to the revocation of gifts differ from those of the Hanafis in the following points:—

(1) Instead of the line being drawn at the prohibited degrees, Shia opinion is divided between those who consider all gifts to blood-relations irrevocable and those who limit the privilege to parents.

(2) The more approved Shia view is that husband and wife are legally on the same footing with strangers as regards the power of revoking gifts made by one to the other, though it is considered unseemly on their part to exercise the power.

Baillie, II, 205; Querry, I, p. 598, ss. 19, 20, 25.

WAKF.

(IN CONTRAST WITH CHAPTER XI.)

320.—**483.** It is more unanimously and unambiguously laid down by the Shia than by the Hanafi authorities that a *wakf*—

More absolute insistence on delivery of possession, and immediate, unconditional, operation.

(1) Cannot be made *inter vivos* by mere declaration, but requires actual delivery of possession [1]; and

(2) Cannot be made contingently on the happening of a future event, nor even postponed to a fixed future date, such as "the commencement of next month." [2]

Supposed difference as to testamentary *wakf* no longer admitted.

But these rules are not now so interpreted as to prevent a *wakf* made in the form of a will from taking effect to the same extent as in Hanafi Law, namely, on one-third of the estate, or on the whole if the heirs consent.[3]

Wakf in death-illness, with delivery of possession.

If made in death-illness (*Maiz-ul-maut*), the *wakf*, even if possession is delivered by the maker of the *wakf*, it is valid only to the extent of one-third, unless the heirs consent.[4]

[1] Baillie, II, 212. "The contract [of *wakf*] is not rendered obligatory except by giving possession." Mr. Baillie remarks in a footnote that this is not required by the Hanafis; yet in his own rendering of the Fatawa Alamgiri (Digest, I, 551) we read that the opinions of the learned are nearly balanced between Abu Yusuf, who considered mere declaration to be sufficient, and Muhammad, who insisted on delivery of possession; which latter view, as shown under s. 320, *ante*, is the one apparently favoured in the Hedaya, and was adopted by the Allahabad H.C. in *Muhammad Aziz-ud-din*, 15 All., 321 (1893).

[2] Baillie, II, 218. "If the appropriation is restricted to a particular time or made dependent on some quality of future occurrence, it is void." The precise example in the text—"when the beginning of the month arrives"—is cited in *Agha Ali Khan*, 14 All., 429 (1892) at pp. 455-6; and on the strength of these texts, and following the *dicta* of Mahmood, J., in that case, it was held in *Syeda Bibi*, 24 All., 231 (1902), that a *wakfnama* was invalidated by the mere insertion of the words, "this deed shall come into force from the date of its registration," though the deed also provided that the person named should be *mutawalli* from the date of execution, and though there was actually only an

interval of a week between execution and registration. Here the texts cited go rather beyond the F. A. (Baillie, I, 556), which only invalidates *wakfs* suspended on uncertain contingencies —*e. g.*, " if my son arrives " ; and the decision goes rather beyond the Madras ruling in the Hanafi case of *Pathukutti* v. *Avathalakutti*, 13 Mad., 66 (1888), noticed under s. 320, *ante*. It is, however, permissible to doubt whether the Shia doctrine would have been so rigorously applied, had the case of *Syeda Bibi* arisen either after the first, or before the second, of the two cases discussed in the next note.

[3] *Baqar Ali Khan* v. *Anjuman Ara Begam*, 25 All., 236 (1903), a P. C. case expressly overruling *Agha Ali Khan*, 14 All., 429 (1892), which was itself a Full Bench decision, supported by Mahmood, J., in a very elaborate judgment, his two English colleagues concurring. The answers formulated by the Full Bench to the questions referred to them in the last-mentioned case were as follows :—

" (1) A *wakf bil wasiyat* (testamentary *wakf*) is not valid under the Muhammadan Law of the Shia school in the absence of actual delivery by the *wakif* (appropriator) himself of possession of the appropriated property to the *mutawalli* or person appointed as superintendent thereof by the deed by which the *wakf* is created.

(2) The death of the *wakif*, before actual delivery of possession by him to the *mutawalli* or the beneficiaries of the trust, invalidates the *wakf* so as to render it null and void *ab initio* under the Shia Law.

(3) The consent of the appropriator's heirs cannot validate such a *wakf* under that law."

The chief point urged in support of these conclusions was the definition of *wakf* in the Sharâ-i' (Baillie, II, pp. 211 and 212) as a contract (*akd*) requiring to be completed by delivery of possession ; no notice being taken of the fact that the Hanafi jurist Muhammad also insists on this requirement, though he does not define *wakf* as a contract, and does not infer therefrom the invalidity of testamentary *wakfs*. But stress was also laid on the passage from the Jami above referred to, proving that the Shia Law will not allow a *wakf* to be contingent on any future event, " whether or not such event is likely or possible, or even where it is certain to occur, such as the beginning of next month, *or the occurrence of the death of the wakif*." A passage cited on the other side from a Shia treatise of equal authority, which seems to speak of testamentary *wakfs* was disposed of by pointing out that the actual expression used was not *wakf bil wasiyat* but *wasiyat bil wakf*, *i. e.*, a testamentary direction (to the executor) to constitute a *wakf* after the testator's death, the validity of which the learned judge was apparently prepared to admit.

Their Lordships of the Privy Council did not fail to point out, in the subsequent case which came before them, that the distinction thus taken was one of form, not of substance, and had little to commend it unless they were constrained by authority to accept it. They found, however, that the logical inference which Mahmood, J., had thought himself obliged to draw from the ancient texts was nowhere drawn by the authors themselves, nor by the modern lawyers who had collected and translated them ; and they thought it " extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow from ancient texts, however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions."

[4] Baillie II, 212. *Ali Husain* v. *Fazal Husain* (1914), 36 All., 431, where the Shia authorities are reviewed in detail.

Section 483 of the first edition, for which the above is substituted, deal with an apparent difference between t he two systems in respect of the

subject-matter of *wakf*, which closer comparison shows to be only apparent or at all events unimportant.

The Shar-ái' (Baillie, II, 213) lays down the broad general rule that the subject-matter must be a substance, the property of the appropriator, capable of being used without being consumed, and also capable of being delivered. As to current coin (*deenars* and *dirhems*) opinion is said to be divided, and although the negative view is stated to be "the most manifest or best supported by traditional authority," the arguments are so put as to give the impression that the author himself felt the affirmative view to be the more reasonable. Comparing this statement with the Hanafi authorities collected in the cases referred to under s. 318, *ante*, the balance of Arabic authority seems to be much the same in both systems; and the perplexity of British judges, called upon to determine the application of these ancient texts to modern forms of investment, would have been neither greater nor less had the parties happened to be Shias instead of Hanafis.

323, illus. (*a*).—**484.** It is essential to the validity of a Shia *wakf* that the founder should divest himself not only of full ownership, but of everything in the nature of usufruct; and therefore, where by the terms of the endowment a portion of the income is reserved to the endower himself during his life, not only is the actual clause of reservation void, but all that part of the deed which relates to the subsequent devolution of the reserved income is also void;[1] but so much of the deed as relates to property devoted from the first to purposes unconnected with the personal benefit of the endower may nevertheless be valid.[2]

Effect of endower reserving a portion of the income.

Explanation I.—If the endower (*wákif*) happens to be included in some general class of beneficiaries described in the deed of endowment, he will not be debarred from claiming in that capacity.[3]

Explanation II.—There is no objection (any more than in Hanafi Law) to an endower constituting himself trustee (*mutawalli*) of his own endowment, and allotting to himself for his services in that capacity the same remuneration that he assigns to his successors.[1]

Illustrations.

(*a*) A lady executed a deed of endowment of which she constituted herself the first trustee, and appropriated the property in the following manner: two-thirds of the income to herself during her lifetime for her necessary expenses, the remaining third to be divided into 55 shares, of which some were to be distributed to certain persons therein mentioned, charged with religious duties, and the residue to be expended on religious ceremonies which were specified. After her death, the trustee who might succeed her was to retain one-third of the net income on account of the trusteeship, and apply the remaining two-thirds (instead of the original one-third) to the purposes above mentioned.

After the lady's death, in a suit by one of the persons for whose benefit she had directed certain shares to be appropriated, against the person who succeeded her as trustee, it was held by the Allahabad High Court, in accordance with the Shar-ái', that the deed was altogether void as regards the two-thirds originally appropriated to the settlor herself, and that the plaintiff could therefore claim nothing thereout: but it was also held, in default of any distinct authority to the contrary, that the deed was valid to the extent of the remaining one-third, and that, that share of the property was available for the satisfaction of the trust declared by the settlor to take effect after her trusteeship.[2]

(*b*) "If one should make an appropriation for the poor and should himself become poor, or for lawyers, and himself become a lawyer, there is no objection to his participating in its benefits."[3]

(*c*) "If, in the case put in illustration (*a*), a certain fixed amount, or perhaps if even a certain fraction of the net income, had been assigned in general terms for the maintenance and remuneration of the trustee or trustees for the time being, such a provision would have been valid."[4]

[1] Baillie, II, 218, contrasted with 1,285, and with the case of *Jaun Bibee*, Fulton, 345 (1888): Querry, I, p. 583, s. 65.

[2] *Haji Kalub Hossein*, 4 N. W. 155 (1872); the facts are summarised, and the judgment, so far as material is set out at full length, in Ameer Ali's Mahommedan Law, vol. i, p. 415.

[3] Baillie, II, 219; Querry, I, p. 584, s. 67.

[4] See a lengthy disquisition quoted by Ameer Ali (M. L., vol. i, p. 411) from the comparatively modern treatise known as the Jamaa-ush-Shittât and note therein especially the following (p. 413): "The jurists are agreed that where anything has been fixed for the *mutwallis* generally it is lawful for the *wakif*, when he happens to be *mutwalli*, to take so much as is fixed for the other *mutwallis;* but I have nowhere seen that it has been held that a *wakif*, while he is a *mutwalli*, can lawfully take for himself anything he likes out of the *wakf* simply because he himself is the *mutwalli*." The Shar-ái' has nothing about remuneration, but tells us that "it is lawful for the *wakif* to retain the superintendence of the *wakf* to himself, or to appoint another to the office" (Baillie, II, 214).

323.—[**484A.** Apart from British decisions applying to *wakfs* created prior to, 1913, which it is impossible to reconcile with any such doctrine, it would seem to be Shia Law that not only may a *wakf* be made primarily in favour of an individual and his descendants, or of an individual simply, but it is neither necessary to express, nor will the law imply, any ultimate dedication to a public and unfailing purpose; so that even in the absence of such provision full effect would be given to the deed as a private settlement, and the settled property would revert to the heirs of the settlor upon the extinction of the individual, or the line, specified, and not before.]

Difference as to settlements with no ultimate public purpose.

Baillie, II, 218. "So also, when made in favour of persons who will probably fail, as, for instance, if one should make a settlement on Zeyd with a restriction to himself, or extend it only to generations that will probably fail, or say generally 'for his successors,' without mentioning what is to be done after they fail—in all these cases it is maintained by some that the *wakf* would be entirely void,

but others insist that due course should be given to the purposes actually named; *which seems more reasonable.* Thus, when they do fail, the property will revert to the heirs of the *wakif* or appropriator; but some of our doctors maintain that it reverts to those of the *mowkoof alehi* (beneficiary). The first opinion, however, is the best supported by traditional authority."

This doctrine differs both from that of Abu Yusuf, who considered that an ultimate trust for the poor would be implied by law if no other was expressed and from that of Muhammad, who insisted that a *wakf* without such an ultimate trust would be void altogether; while it agrees with what is here submitted to be the unanimous opinion of Hanafi lawyers, that family settlements by way of *wakf* are in themselves perfectly legitimate. On this point the Shia texts are stronger, if possible, than those Hanafi authorities which the Privy Council decisions for *wakfs* prior to 1913 interpreted in the manner shown in Appendix B below. Thus the *Jami ul Shattat,** as cited in *Agha Ali Khan*, 14 All. at p. 452, after laying down as the general rule that *wakf* being a contract requires acceptance by the other contracting party, goes on to explain that this may be dispensed with where it is impossible because of the *wakf* being for public charities; in other words, it treats public endowments as abnormal though permissible, and private settlements as the normal type of *wakf*. But, nevertheless, in the Shia case of *Hamid Ali* v. *Mujawar Husain*, 24 All., 257 (1902), the two judges who heard the appeal, while differing as to the application to the facts before them of what was then supposed to be the Shia rule against testamentary *wakfs* (s. 483), and discussing in that connection the very judgment in which that citation occurred, were agreed in holding the *wakf* in question to be fatally vitiated by the fact that it was "not so much intended to satisfy charitable or pious objects as to secure the donor's property for his family." For this proposition no Shia authority was, or could have been, adduced, but it was tacitly assumed that the current of decisions which had settled the law for Hanafis must have settled it for Shias also. If a *wakf* is void in which public are subordinated to family purposes, it must *à fortiori be* void when the former are not mentioned at all, and are not even supposed to come in by implication of law on failure of the latter.

I have therefore enclosed the above section in brackets, as representing, not actual Anglo-Shia Law, but Shia Law which has not yet been judicially considered in relation to the principles affirmed by the highest tribunal for Hanafi cases.

Since the passing of the Mussulman *Wakf* Validating Act, 1913, for which see Appendix B below, we have the General Muhammadan Law of *Wakfs* stated in sec. 3 (*a*) of the Act. The proviso to that section is governed by sec. 5 of the Act, so that any peculiarities of Shia Law in this respect are still important and can be urged in Shia cases coming before the Courts.

313, 317.—**484B.** The Shia Law permits the granting *inter vivos* of usufruct of use of a thing while reserving the ownership, as a transaction distinct on the one hand from gift (*hiba*), and on the other hand from immobilisation or dedication (*wakf*, or *sadakah*). The most general term to describe such grants seems to be *hubs*, while the words *sukna*, *umra*, and *rukba* are employed respectively according as the feature in the

Limited grants with reservation of ownership.

* *Sic* in the Report: written by Ameer Ali (as cited above) *Jamaa-ush-Shittât.*

transaction to which attention is specially directed happens to be—

(1) The right of residence (whatever the duration of the grant) ; or

(2) the fact that the right (whatever its nature) is to endure for the life of the grantee [or of the grantor ?] ; or

(3) the fact that the right (whatever its nature) is for a fixed period.

Baillie, II, 226 ; Querry, I, p. 593 : representing the Book (so-called) of " *sukna wa hubs* " in the Shar-ái.' Though filling barely a page in the Arabic, it is there treated, not as a chapter or section, but as a separate book, as though to mark the distinctness of its subject-matter from that of the books which precede and follow it, the former of which is entitled " Of *wakfs* and *sadakahs*," the latter " Of *hiba*." Its own heading I should be inclined to render, " of residence and (other) restricted grants " ; for the two terms can no more be properly co-ordinated with each other than horses with quadrupeds. The original meaning of *hubs*, " imprisonment " or " detention," is practically identical with that of *wakf*, and the two terms are in fact treated elsewhere as interchangeable. *Wakf* is defined in the Shar-ái' as " a contract the effect of which is to " *hubs* " the original of the thing, and to leave the usufruct free ; " and in the portion of that work now under consideration we are told that anything which may be the subject of *wakf* may be the subject of *umra*. The French translator gives ' El Hèbs ' as the full title (ignoring *sukna*), and renders it " foundations for a limited period," showing that he regards it as a special modification of *wakf*. Baillie indicates the same view still more pointedly by altering the arrangement of the original, putting *hiba* before *wakf*, and treating the matter covered by the title " *sookna* and *hoobs* " as the third chapter of his Book V, headed " Of Wookoof and Sudukat : or, Appropriation and Alms." Ameer Ali, on the other hand, makes " limited estates " a sub-department of his chapter entitled " The Shiah Law relating to Hiba or Gift " (the whole subject of gift being broadly distinguished from that of *wakfs* or trusts) ; and in the first edition I followed his classification in placing this point of difference between the sects. The fact of difference is, however, unaffected by the question of classification ; because supposing *umra* and *sukna* to be treated as modifications of *wakf* rather than of *hiba*, they would contravene the Hanafi rule that perpetuity is an essential condition * (Baillie, I, 557) ; while if *umra* is regarded as a species of *hiba*, it contravenes the rule laid down (*Ib.*, p. 509) that if a man says to another, " this mansion is thine *oomree*, or *hyatee* (for thy life)," is lawful, and the condition void.

" *Or of the grantor.*" The note of interrogation following these words in the text does not imply any doubt as to the possibility of creating what would be called in English law an " estate *pur autre vie* " ; it refers merely to the question whether *umra* would be the proper term to describe such a grant. We are expressly told that the words constituting *hubs* may be, " I have bestowed on thee this mansion, etc., for thy life *or my life*, or for a fixed period," and that in the second case " the contract cannot be revoked, though the life-tenant should die, and what was his is transferred to his heir till the death of the proprietor."

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* This is also the rule of Shia Law as regards *wakf* proper : but not as regards *hubs*.

There is no difference between the sects as to the validity of usufructuary bequests: see s. 277, *ante*, and compare Baillie, I, Book X, ch. vi, with II, p. 241.

In construing grants of *sukna*, if the duration is unspecified, it is only a tenancy at will; if the mode of occupation is unspecified, it is restricted to the grantee himself, his dependants (*ahl*), and his children, and he may not sublet.

If a person makes a *hubs* (without specification of time) of a horse * or slave, "in the way of God," or for the service of the Kaaba at Mecca, † or of a mosque, neither he nor his heirs can revoke the grant, which terminates only with the death of the animal or slave; but if the *hubs* be in favour of a private individual, it holds good only during the life of the grantor, and on his death the property reverts to his heirs.

In *Banoo Begum*, 32 Bom., 172 (1907), the Bombay High Court had to consider the effect of a decree taken by consent in a suit between Shia Muhammadans, which directed that certain property should be enjoyed by the wife of the first plaintiff for her life, and that after her death it should be sold and the proceeds divided among his sons. Two of these sons, having sold their prospective interests during the lifetime of the wife, claimed nevertheless to share in the division after her death on the ground that what they had purported to sell was a mere possibility, and as such not transferable. Rightly or wrongly, the case was argued with reference to the Muhammadan Law as well as to the Transfer of Property Act, and extracts from certain Shia law books, dealing with *umra* and *sukna*, were relied on as proving both the legality of the arrangement and the transferability of the so-called vested remainders. In reality, as was pointed out by Beaman, J., in a subsequent case, *Jainabai* v. *R. D. Sethna*, 34 Bom., 604 (1910), though these texts cerainly affirm the transferability of the reversion remaining in the grantor of an *umra*, and one of them speaks of an *umra* to a person *and his descendants*, it does not follow, and is nowhere asserted, that a like power is vested in the recipients of the *umra*.

As to the supposed decision of the P. C. in *Umes Chunder Sircar*, L. R., 17 Ind. Ap., 201, and 18 Cal., 164 (1890), that the Hanafi Law permits the creation of a vested remainder, transferable and attachable, see under s. 315.

PRE-EMPTION.

(IN CONTRAST WITH CHAPTER XII.)

Several decided cases have settled the point that the Shia law of pre-emption can be invoked in the Courts. The first case is that of *Shaikh Daim* v. *Asooha Beebee*, 2 N., W. 360 (1870). There the appellants took their stand on the alleged Shia rule that there is no right of pre-emption where the number of co-sharers exceeds two (see s. 487, *post*); the parties being confessedly Shias, the Court did not dispute the applicability of Shia Law, but decided against the appellants on the ground that the Shia authorities brought to their notice were not unanimous, that they, therefore, felt themselves at liberty to consider what had been the practice of the Shias in India for the last fifty years and more, and that not one instance had been adduced in which a claim for pre-emption made by a Shia had been questioned on this ground. In 1888, however, precisely the same point came before the same High Court, and Mahmood, J., with the concurrence of his English colleague, held that the Shia Law was clear against pre-emption in the case of a plurality of shareholders, and thus raised

* Misprinted "house" in Baillie, II, 227.

† I follow here Querry's paraphrase (the literal rendering being "*the* house") in preference to Baillie's "*a* house." See vol. i, p. 594, s. 20.

for the first time into practical importance the question whether the distinctive Shia rules on the subject of pre-emption are, or are not, enforceable in suits between Shias in British India; *Abbas Ali*, 12 All., 229 (1888). The learned judge considered it sufficient to refer to the general practice of administering Shia Law to Shia litigants, and to the Privy Council decision in *Rajah Deedar Hossein*, 2 Moo. Ind. Ap., 441 (1841), as the leading authority for that general practice. In the third case, *Qurban Husain*, 22 All., 102 (1899), it was admitted by counsel for the plaintiff, and therefore assumed without argument by the Court, that a Shia vendor could have successfully resisted a claim of pre-emption by a Sunni plaintiff in a case where such a claim would be bad by Shia though good by Sunni law, and on that ground it was decided that when the parts were reversed, the Shia could not be allowed to avail himself of the Sunni law against a Sunni vendor and a Sunni vendee, for want of reciprocity. In *Pir Khan*, 36 All., 488 (1914), a Shia vendor (the vendees being Hindus) did successfully resist in the Allahabad High Court a claim of pre-emption by a Sunni pre-emptor, on the ground that under the Shia law there was no right of pre-emption, as there were more than two co-sharers. The earlier Calcutta ruling in *Jog Deb Singh*, mentioned below, was considered by the Court and not followed. The ruling of the Court was not as the headnote of the Report seems to suggest, that the law of the vendor should be followed in such cases, but that the rule of equity and reciprocity should be applied. On a consideration of the decided cases, the result is that, under the Allahabad High Court, the Shia law of pre-emption is to be applied where both the vendor and the pre-emptor, or *either* of them, is a Shia. The Shia law gives a more restricted right of pre-emption, and it would not be equity for a Shia pre-emptor to claim, or for a Shia vendor to be saddled with, a more extended right than his own law allows him.

In *Jog Deb Singh*, 32 Cal., 982 (1905), the vendor being a Shia but the pre-emptor being a Sunni, and the case being one in which a suit for pre-emption would not lie according to Shia law, the High Court of Calcutta considered the Sunni law to be applicable and confirmed the decree in favour of the plaintiff distinguishing *Abbas Ali* v. *Maya Ram* on the ground that there both vendor and pre-emptor were Shias, and referring to *Qurban Husain* v. *Chote* as favouring the view that the law of the Shia sect only prevails where both parties are Shias. It is important to note that this case arose in Behar, where by territorial custom the Muhammadan Law of Pre-emption is universally applicable, irrespective of the religion of the parties (s. 357). Had it arisen in Lower Bengal, where according to modern Calcutta decisions, it is necessary that the vendee, as well as the vendor and pre-emptor, should be a Muhammadan or quasi-Muhammadan, it would have presented a different aspect. The vendees were in point of fact Hindus, and this would have been fatal to the suit. Had they not been, it might have been forcibly argued that a Shia vendor, whose religion recognised *a* law of pre-emption, but not *the* Sunni-Hanafi law of pre-emption which was sought to be imposed upon him, must have at least as good a right to be exempted from its application as a Hindu vendee.

Pre-emption cannot be claimed by a mere neighbour.

356 (3), 359.—485. There is no right of pre-emption on the ground of mere vicinage.

Baillie, II, 175 (definition and footnote) and 179; Querry, II, p. 271, s. 1 (definition), and p. 273, s. 19.

The case of *Qurban Husain*, referred to in the introductory note on Pre-emption above, turned upon this peculiarity of the Shia Law. The plaintiff, a Shia, sought to pre-empt as a neighbour, the vendor and vendee being Sunnis. As above stated, his suit was dismissed on the ground that in the converse case his own law would have protected him against such a claim.

356 (2).—486. There is no right exactly corresponding to the Hanafi right of pre-emption on the ground of "participation in the appendages." But if, after certain lands have been divided off, the roads or rivulets passing through them continue to be joint property, *though sufficiently wide to admit of division without destroying their utility*, and one of the partners in the latter sells his share therein together with his portion of the divided land, the other partner may claim pre-emption not only with respect to the share in the road or rivulet, but also with respect to the portion of land divided off, as being connected in sale with the other. If, however, the road or rivulet is so narrow that a partition would be highly inconvenient (in which case neither partner can enforce it against the wish of the other), no right of pre-emption arises with respect to either the rivulet or the divided land.

Nor by a "participator in the appendages," as such.

Baillie, II, p. 177; Querry, II, p. 272, ss. 12, 13. The principle seems to be that (1) a neighbour as such is not considered by the Shia lawyers to suffer any injury requiring legal redress by the substitution of a new neighbour for an old one, and that (2) the joint enjoyment of things, such as roads and water-courses, of which the utility would be destroyed by division, is an ordinary incident of neighbourhood; but that (3) the right of pre-emption on the ground of joint ownership attaches to everything owned jointly which is capable of partition, and none the less because sold in conjunction with something else held in severalty.

356 (1), 358.—487. There is no right of pre-emption even among co-proprietors if their number exceeds two.

No pre-emption even for co-sharers if more than two.

Baillie, II, 179; Querry, II, p. 273, s. 20 where the above is declared to be the most prevalent of three discrepant opinions. It was accordingly on acted in *Abbas Ali*, 12 All., 229 (1888), dissenting from two previous rulings of the Allahabad High Court, *viz.*, *Sheikh Daim*, cited above on another point, and *Tafazzul Husain* v. *Hadi Hasan*, C. W. N. (1886), p. 139, to which I have not been able to refer. It must be owned, however, that the authority of this latest ruling is somewhat weakened by the fact of it being partly based on a glaringly inaccurate account of what is said on the subject in the Shar-ái'. In the judgment of Mahmood, J. (Straight, J., concurring), stress is laid on the supposed fact that the Shar-ai' and other authoritative books of the Shia Law do not contain any discussion of the case in which there is more than one pre-emptor as proving that the opinion of those who allowed a plurality was never followed in practice. The real fact is that the Shar-ái' does contain a lengthy discussion of this very case, which occupies three pages and fifteen sections in Querry's translation. Baillie refers to it in a footnote (p. 181), but omits it, as he tells us, as being of no practical utility in view of the author's admission that the opposite opinion is the weightier. In Anglo-Muhammadan law the point is no longer open to dispute: it was assumed in *Pir Khan*, 36 All., 488 (1914).

In the first edition of this work the question was treated as an open one and a section (now omitted) dealt with a point in which those Shia lawyers who do not disallow pre-emption altogether among a plurality of co-sharers show themselves even more indulgent than the Hanafis as regards the conditions under which the right may be exercised. The new s. 488 deals with an entirely different point.

It will be seen (s. 490) that the rule in question only relates to the original right of pre-emption, and does not prevent a plurality of heirs of a single co-sharer, who dies after demand and before acquiring possession, from availing themselves of, and completing, the action initiated by their ancestor.

390A.—**488.** If, after the completion of the contract, the vendor chooses to make an abatement of the price in favour of the purchaser, the pre-emptor must nevertheless pay the full price.

Pre-emptor cannot claim benefit of abatement of price.

Baillie, II, 183; Querry, II, p. 279, s. 53.

[I have omitted sec. 488A of the last edition, about sale on credit, because I think the Hanafi view is the same as the Shia and the Shafei view; see sec. 362 and notes, and also sec. 419A, above.—A. Y. A.]

375.—**489.** The distinction between the immediate demand (*tálab-i-mowasibat*) and the formal demand before witnesses (*talab-i-ish-had*) is not recognised. All that is necessary is that the pre-emptor should use reasonable diligence in preferring his claim, either personally or by agent, after becoming acquainted with his right.

Only one demand necessary.

Baillie, II, 183, 184, 195; Querry II, p. 280, ss. 56-61, and p. 290, s. 110. In the latter passage the Shar-ái' even goes so far as to deny that the right is extinguished by the pre-emptor being present at the sale in the capacity of a witness, or congratulating the parties on the conclusion of the bargain.

385.—**490.** If the person entitled to pre-empt dies in the interval between the sale which gave occasion to the exercise of his right and its complete realisation by surrender of the property or judicial decree, the right devolves upon his heirs, and the property acquired by their joint claim will belong to them jointly in the first instance, and will be divisible among them on demand of either in the ratio of their shares of the inheritance, anything in s. 487 to the contrary notwithstanding.[1]

The right is not extinguished by death of pre-emptor before realisation.

Illustration.

A Shia dies after the accrual, but before the realisation of his right of pre-emption, leaving a widow and a grown-up[2] son or daughter. Either or both may claim pre-emp-

tion, and if both claim together the property when acquired will be divisible between them in the proportion of $\frac{1}{8}$ to $\frac{7}{8}$ [3].

[1] See Bailie, II, 190, 191, and Querry, II, p. 285, ss. 89, 90. Compare the Shafei Law, s. 421, *ante*.

[2] As to the case of the person entitled being a minor, see the next section.

[3] It will be remembered that neither by Hanafi nor by Shia Law does the widow take any share in the Return.

386.—**491.** If the person entitled to claim pre-emption happens to be a minor or a lunatic, his guardian is (as by Hanafi Law) competent to make the claim on his behalf; but if it is not then made, the minor on coming of age, or the lunatic on recovering his reason, may make it on his own account; and, conversely, he may annul a pre-emptive purchase made by his guardian, if it was manifestly disadvantageous to him.

Minors and lunatics, effect of removal of disability.

Baillie, II, 180; Querry, II, p. 274, ss. 24, 25, 26. It appears from the Hedaya that some Hanafi authorities agree with the Shias, but the compiler of that work appears to prefer the opposite view.

CHAPTER XV.

MO'TAZILA LAW" (?)

Under this head Sir Roland Wilson had, in the last edition, two sections, secs. 492 and 493, which I have omitted. It is clear that there is no recognised community in India. Holding a Mo'tazila law, and that no such law will be enforced in the British Courts in India with regard to any Muhammadan. Sec. 492 suggested the unlawfulness of a marriage with more than one wife at the same time, and sec. 493 the unlawfulness of a private divorce, *i. e.*, one carried out without the intervention of a Court. As suggestions towards a reform of law they are entitled to respectful hearing as emanating from a jurist of such eminence and erudition as Mr. Ameer Ali, on whose book the sections were based, but they are superfluous in a book examining what the law actually is, as administered in the British Indian Courts.

The references are to Mr. Ameer Ali's "Mahommedan Law" (Ed. 1892-4), vol. II, p. 21, and again p. 158, p. 409. With respect to monogamy Sir Roland Wilson write :—

"As regards the opinions of the early Mo'tazalas, I am not in a position either to confirm or to refute the statement that some of them inculcated monogamy as a counsel of perfection. But it is remarkable that Al Mamun, the sovereign under whom they enjoyed more political influence than ever before or since, and whom they encouraged to assert a legislative power unknown to his predecessors, used, or attempted to use, that power in the opposite direction, by proclaiming the legality of *muta* or temporary marriages. (See p. 104, *ante* and Osborn, Khalifs of Baghdad, p. 253, note.) It has been shown in the preceding chapter (s. 438) that those jurists who allow temporary wives also allow an unlimited number of them, so that the contradiction is direct and palpable between the supposed teaching of the Mo'tazalas and the action of their royal patron.

Mr. Ameer Ali has cited no authority for holding that the old Mo'tazila school (now extinct) held these doctrines about marriage and divorce. As far as is known to the present writer, or to the living authorities on Arabian literature whom he has had the privilege of consulting, the historical Mo'tazila school mainly divided from other schools in Islam on doctrines of speculative theology such as : Freewill *versus* predestination ; was the Koran created ? ; what was the nature of the attributes of God, were they eternal ? ; etc. There does not seem to be any record of their having raised the question of monogamy or divorce, or instituted (apart from the zaidiyas) any school of practical law. Their tendency was rationalistic, and it is doubtful whether they would not have considered it more rational to have divorce as a private matter between the parties, or perhaps their families as arbitrators (Kor. iv. 35) than a matter to be dragged *coram populo* in the approved English Divorce Court style ; though they would, no doubt, if they had lived in modern times, have insisted upon the proper registration of divorces (and marriages also) among the Muhammadans. They would also have insisted (as most progressive Muhammadans do at the present day) that the spirit of Islamic ordinances (*e.g.*, Kor. iv. 3, and iv. 129) considers monogamy the normal rule in both theory and practice, and that

divorce (as the Prophet declared in a tradition) is, of all things permitted, the most detestable. See also Kor. iv. 128-130. But such doctrines, held by most enlightened Muhammadans, apart from any leanings towards any sect, ancient or modern, do not constitute Muhammadan *Law*, as expounded by any recognised School.

Further information on the Mo'tazilas will be found in:

The Encyclopædia Britannica, 11th Ed., xvii. 423 (*s.v.* Mahommedan Religion).

H. Steiner: Die Mu'laziliten, Leipzig, 1865.

Almu'tazila, being an extract from the Kitab-ul-milal wan-Nihal, by al-Mahdi Ahmad ibn Yahya ibn-il-Murtaza; Arabic text, edited by Prof. T.W. Arnold; Leipzig, 1902. The original author was an Imam of the Zaidiya School, who believed in Mo'tazila doctrines, and thus writes from inside knowledge, thus contrasting with other accounts which have come down to us in Arabic, with an anti-Mo'tazila bias. He died about A. D. 1437.

APPENDICES.

A. The Code of Criminal Procedure, Chapter XXXVI, ss. 488-490 (Maintenance Orders).

B. Family Settlements by Way of Wakf.

C. The Statutory Law of Pre-emption in the Panjab and Oudh (Act 1 of 1913, XVIII of 1876).

D. The Koranic Basis of Anglo Muhammadan Law.

APPENDIX A.

THE CODE OF CRIMINAL PROCEDURE, 1898. CHAPTER XXXVI, ss. 488-490.

See ss. 55 (*c*), 77 (1), 78 (5), 148, 441, *of this Digest.*

Order for maintenance of wives and children.

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child, unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate, or a Magistrate of the first-class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding fifty rupees in the whole, as such magistrate thinks fit, and to pay the same to such person as the magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

Enforcement of order.

(3) If any person so ordered wilfully neglects to comply with the order, any such magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

(4) No wife shall be entitled to receive an allowance from her husband under this section, if she is living in adultery, or if, without any sufficient reason she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the magistrate shall cancel the order.

(6) All evidence under this chapter shall be taken in the presence of the husband or the father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases:

Provided that, if the magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the magistrate may proceed to hear and determine the case *ex parte*. Any order so made may be set aside for good cause shown, on application made within three months from the date thereof.

(7) The accused may tender himself as a witness, and in such case shall be examined as such.

(8) The Court, in dealing with applications under this section, shall have power to make such order as to costs as may be just.

(9) The accused may be proceeded against in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

Alteration in allowance.

489. On proof of a change in the circumstances of any person receiving under s. 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the magistrate may make such alteration in the allowance as he thinks fit, provided the monthly rate of fifty rupees in the whole be not exceeded.

Enforcement of order of maintenance.

490. A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order shall be enforceable by any magistrate in any place where the person against whom it is made may be, on such magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

APPENDIX B.

PART I.—FAMILY SETTLEMENTS BY WAY OF *Wakf*. ANCIENT AUTHORITIES COMPARED WITH MODERN DECISIONS.

Though the question of the validity of family wakfs is no longer in dispute since the passing of the Mussalman Wakf Validating Act, 1913, the divergence of the law as interpreted before by the courts and the law as expounded by text-writers and as now declared by the legislature is so interesting that I retain the greater part of Sir Roland Wilson's note on the subject. At the end of this appendix I have added the text of the Act, with notes to the sections.

The question raised by the following sentence in a recent Privy Council judgment (*Mujibunnissa*, 23 All. at p. 245 [1900] has been much discussed in India : " The theory of the deed seems to be that the creation of family endowment is of itself a religious and meritorious act, and that the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate is a meritorious purpose. *It is superfluous at the present day to say that this is not the law.*"

That it *is* the Muhammadan Law (considered apart from British decisions) has been constantly maintained by Mr. Ameer Ali, both from the Bench and in his book.

" Every ' good purpose ' which God approves, or by which approach is attained to the Deity, is a fitting purpose for a valid and lawful *wakf* or dedication. *A provision for one's self, for one's children, for one's relatives, is as good and pious an act as a dedication for the support of the general body of the poor.* The principle is founded on the religion of Islam, and derived from the teachings of the Prophet, and therefore any variation of the rule is a direct interference with the Mussulman religion " (M. L. i, 216).

THE HEDAYA.

Of the numerous authorities which the learned author adduces in support of his view, it will be best to begin with the Hedaya ; not because it is the most serviceable for his purpose, but rather for the contrary reason, because Hamilton's version of it was the original and almost the only source of that current of adverse British decisions which ultimately became so strong as to carry away the Privy Council.

The Hedaya contains no direct reference to family settlements extending beyond a single generation ; but if it does not assert, neither does it in any way deny their validity ; and it says quite enough to show that the compiler saw no objection to making provision by way of *wakf* for living relatives, even though not in need of charity in the ordinary sense of the term.

Take, for instance, the passage (p. 234) in which the question under discussion is whether or not it is necessary to the completeness of a *wakf* that th

founder should expressly " destine its ultimate application to objects not liable to become extinct " ; Abu Hanifa and Muhammad affirming the necessity, while Abu Yusuf considered that the mere fact of making a *wakf* implied by definition the extinction, once for all, of private ownership over the subject-matter ; consequently that, if the specified object were terminable the vacuum must be filled, as a matter of necessary legal implication, by the title of the poor " who are always with us." Now, the example selected by Abu Yusuf to test his principle is that of a dedication in the first instance *to a single individual*. Abu Yusuf maintains that if, instead of saying, " I appropriate this to such a person, and after him to the poor," the proprietor simply says, " I appropriate this to Zeyd," it is valid, and " after the death of Zeyd it passes as an appropriation to the poor, although the appropriator had not named them. " The compiler abstains as usual from pronouncing definitely in favour of either disputant, except by giving Muhammad the last word; but the point that concerns us is that in either view it is possible, by a properly worded deed of *wakf*, to bestow upon a private individual a life-interest in the entire income of the dedicated property, and neither disputant lays any stress at all on the distinction between public and private purposes. While Abu Yusuf argues that " the design of the appropriator (*wakif*) is to perform an act acceptable to God, *and this is fully answered in either case, because piety on some occasions may consist in the appropriation of an article to a terminable, and on other occasions to an interminable object*, " Muhammad does not in any way dispute the principle, but merely insists that the form of the deed must show (not leave to be implied) that the ownership, as distinguished from the usufruct, is for ever extinct, passing out of the original owner and not passing into any one else, but to Almighty God as (so to speak) the universal trustee.

Again, at p. 236 where the topic under discussion is the incidence of the cost of necessary repairs to the dedicated property, and a distinction is drawn between a *wakf* simply for the poor and one which is made in the first instance in favour of a *person named*, and after him to the poor; it is said that in the latter case the repairs are due out of that person's property during his life, and not, as in the former case, out of the income of the endowment. What difference this could make to a person entitled to take the whole income for his own benefit is not explained; see on this point the note to sec. 336 above; but I am only concerned now with the proof incidentally afforded that the further enrichment of a friend or relative who is already in easy circumstances may be from the Moslem point of view an act of piety, a means of obtaining " nearness to God " and as such a proper object of *wakf*. Elsewhere in the same chapter, (beginning of p. 238), it is said that " piety is consistent with the circumstance of a person reserving the revenue *to his own use* (as the Prophet has said, ' a man giving a subsistence to himself is giving alms') " ; and the translator's instance, that this applies where the appropriator has reduced himself to the condition of a pauper by the appropriation, must be taken to be a specific instance only, and not meant to be exhaustive, for there is nothing in the text to warrant the inference that the example covers the whole proposition.

Another passage in this same disquisition about repairs (p. 236) carries the matter just a step further, by showing that one purpose for which the machinery of *wakf* was habitually employed was that of providing for the maintenance of adult children without giving them the chance of dissipating the patrimony : " If a person appropriate a house, with this condition that his son * shall reside therein during life, the repairs are incumbent on him who has the right to inhabit it, because he who enjoys the profit must bear the loss."

Beyond this the Hedaya does not help us.

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* " Or any other person " in Hamilton's version ; but these words are not in the original.

BAILLIE'S DIGEST.

The only other work habitually consulted by the Courts through a standard English translation is the Fatawa Alamgiri, as represented by

The title unfortunately obscures to many students, and sometimes even to the Courts, the fact that it is really a more first-hand authority than Hamilton's Hedaya, being a fairly close translation direct from the Arabic, whereas Hamilton made his translation from a loose Persian paraphrase in which text and commentary are mixed up. As between the two originals, the authority of the "Imperial Indian Collection of Precedents" stands at least as high for Indian Muhammadans as that of the Hedaya. The first difference is that the Fatawa Alamgiri seems to side with Abu Yusuf against Muhammad on the question whether an ultimate trust for the poor or some other unfailing purpose can be implied if not expressed. Thus at p. 558, after saying that *according to all opinions* a valid *wakf* in favour of the poor is constituted by such a declaration as "this my land is a *sudukah*,* detained and perpetual during my life and after my death," the compiler goes on to say that "though no mention be made of *sudukah*, yet if *wakf* be mentioned, as by a person's saying, 'This my land is *wakf*' or 'I have made this my land *wakf*' or 'appropriated,' the land would be a *wakf* for the poor, *according to Aboo Yoosuf*. And Sudrash Shuheed and the Sheikhs of Bulkh have said—decrees are given on the opinion of Aboo Yoosuf, and we decree according to it, and also according to custom."

Much more important, however, is the section expressly devoted to the subject of "Settlements on descendants" (s. 2 of chap. iii of Book IX).

Mr. Baillie calls attention in a footnote to the fact that "settlement" represents the same Arabic word (*wakf*) which elsewhere (following Hamilton and Macnaghten) he translates by "appropriation";—an acknowledgment which strikingly illustrates the difficulty of fitting this branch of Muhammadan Law into English legal conceptions.

The commencement of the section is rather startling. "A man says, 'My land is a *sudukah* settled (*wakf*-ed) on myself.' This *wakf* is lawful, according to what is approved." This, of course, implies the adoption of Abu Yusuf's view on the question previously discussed; and the meaning must be that the *wakf* extinguishes all ownership except that of the Deity; that the settlor has the usufruct for his life, and that after his death the income will have to be spent in perpetuity upon the poor, under some scheme to be framed by the Court. This, if not exactly an act of self-denial, is certainly a laudable act of prudential self-control, in the case of a man tempted to squander his capital.

The next example interposes a second life-interest. "I have settled it on myself, and after me on such an one, and then upon the poor." And the converse arrangement, "on such an one, and after him upon me," is declared to be also lawful.

Next the author discusses various forms of *wakf* in favour of children —a phrase which is interpreted differently according as the singular (*walad*) or the plural (*aulad*) is used; the singular being taken to include all children living at the time of the settlement, and if there are none such at that date then, and only then, bringing in son's children then living; and so on with later generations, but with no devolution from the first takers, whoever they may be, to their descendants, so that on failure of the former the *wakf* is for the poor; whereas "if he should say, 'This my land is a *sadakah* settled on my children (*aulad*),' all generations are included on account of the general character of the name; but the whole is to the first generation while any remains; and

* The word "*sudaqa*" (as it would be transliterated now) has come to mean "charity," although the root word may mean "truth" or some analogous idea connected with religion.

when they are exhausted, to the second; and when they are exhausted, to the third and fourth and fifth, [all] these generations participating in the division, and the nearer and more remote being alike." *

If the word "children" may import perpetual succession so long as there remain any lineal descendants, *à fortiori* the use of the very word "descendants" (*nasl*) must have that effect; and we find accordingly several examples of the kind put and discussed with reference to the precise mode of distribution, without the smallest hint of any possible objection on the ground of the length of the chain and the indefinite postponement of the ultimate trust for the poor.

Mr. Ameer Ali, both in his book and in two memorable judgments, has accumulated a mass of testimony to the same effect from other untranslated Arabic works. But the above extracts from a standard work, accessible to all students in its English dress, are surely as conclusive (in the absence of contrary evidence) as any affirmative testimony can be, as to the practice of Indian Muhammadans of the Hanafi persuasion at the date of that compilation (17th century), and also of the practice in Central Asia at the date of the principal text-books relied on by the compilers (12th and 13th centuries). It may be added that the Turkish practice, as described by D'Ohsson a century ago, was substantially the same, and that the Shafeite and Shia authorities are quite at one with the Hanafis as to the validity of settlements on descendants, as has been shown under sections 416 and 484A.

Mr. Ameer Ali has attempted to carry the evidence still further back and to adduce examples of *wakfs* in favour of descendants made by actual contemporaries of the Prophet, and maintained down to the time of our standard authorities. As to this there is perhaps some force in the objection urged by their Lordships of the Privy Council that his precedents are too imperfectly stated to help us much; and we are in no way called upon to go behind the treatises accepted as authoritative by the lawyers of the most orthodox period of Muhammadan rule in India. We find these, so far as they go, absolutely unanimous; the only point open to comment being the silence of the Hedaya as to settlements extending over more than a single generation. The omission is certainly curious; but so is the omission of the entire subject of inheritance from the work as it has come down to us. Both may perhaps be best accounted for by supposing that the copyist considered that his labour might be spared where a particular topic had been better treated elsewhere.

The Current of British Indian Decisions.

Macnaghten, Principles and Precedents of M. L.

Such being the testimony of the original law-sources, how are we to account for the course taken by British judges? Let us see first what that course actually was.

Macnaghten (1825) deals in his 4th Principle with "the grant of an endowment to an individual with reversion to the poor," without any intimation that it would fail to satisfy his definition of endowment as "the appropriation of property to the service of God."

In Case III of the Precedents of Endowments (p. 329), after stating that *waqf* (as distinguished from *Altumgha*) is made for charitable and religious purposes, we are told that in the award of shares to persons entitled to participate in the endowment, the law makes no distinction between males and females, clearly implying that the persons whom he has in view are persons who might

* The word "all" is not in the original, and its insertion seems to make the last clause contradict the previous statement that the second generation only comes in on the exhaustion of the first, and the third on the exhastion of the second. "These generations" I take to mean the third, fourth, fifth, and all below them—the principle of the nearer excluding the more remote not being carried beyond the point specified in the deed.

have been expected to share according to the rules of inheritance—in o her words, a class consisting of somebody's descendants.

Case VIII (2) is actually a case of family settlement, and without any ulterior trust, but its bearing on the present argument may be disputed on the ground that the beneficiaries indicated are the descendants of a saint whose shrine is the nucleus of the endowment. But Q. 3 in the same case is, "Do the male part of the family receive a portion equal to, or larger than, that receivable by the female part?" and the answer is based on a text cited in the Fatawa Alamgir from an older law-source—"If a man say, 'I have appropriated this property to my male and female lineal descendants,' his offspring, whether sons or daughters, will equally participate." Here, again, the validity of a *wakf* in favour of descendants without any condition of poverty, and without any ultimate destination to the poor, seems to be taken for granted.

Coming now to the Reports, what professes to be a complete list of the decided cases from 1798 downwards was set forth by counsel for the respondent in the leading case of *Bikani Mia* v. *Shuk Lal Boddar*, 20 Cal., 116 (1892), with the object of showing that down to 1863 no instances of private *wakfs* had come before the Courts, from which it was inferred that there could have been no general practice of making such *wakfs;* while after that date (it was submitted) most of the decisions were adverse to their legality, unless the private interests were strictly subordinated to some public and unfailing purpose. On this Ameer Ali, J., remarked in his dissentient judgment that the mere negative argument was of little weight, because the Muhammadan law-officers, who were attached to the Courts down to 1864, habitually acted as conveyancers in drawing deeds for their co-religionists, and as arbitrators in the majority of disputes; that while there were confessedly no adverse decisions during the period above mentioned, there was at least one, as early as 1838, distinctly favourable to his view, *viz.*, in *Doe d. Jaun Bibee* v. *Abdollah Barber*, Fulton, 345 (1838). The Reports. Doe d. Jaun Bibee.

As Fulton's Reports are not very accessible, it may be well to mention that the deed is set out *verbatim* in an Appendix to vol. i of Ameer Ali's book, and the judgment at p. 195. The settlor, a widow lady,* after describing certain landed property vested in her as sole owner, grants and disposes of the same, "as a pious donation to please God, Who is above all," on the following conditions :—

> "1st . . . . I will appropriate as much of the produce thereof as is required for my own use unto the said purpose, after defraying the revenue and taxes thereof, and the remainder to *hereditable and charitable purposes;* and my several relatives, that is, my grandson and granddaughter and daughter-in-law, and daughter's son and daughter's daughter, who are now receiving maintenance, living together united in meals, shall continue to receive the same in like manner, and the power of increasing or decreasing the number of incumbents according to the increase or decrease in the produce will remain with me, and the repairs of the mosque, and salary of the Mowuzzin, Khattab, and other expenses connected therewith, in the seasons of Ramazaun Mobarek and the Eed, shall be defrayed from the produce, and the person who is hereafter appointed *mutwalli* will enjoy the same powers as I myself possess.
>
> "2nd. I will continue *mutwalli* as long as I live, and on my decease my daughter's son Abdollah, son of Sheikh Joomun, inhabitant of Calcutta, will become *mutwalli;* after the said Abdollah, one from

* In every subsequent judicial reference that I have seen, the sex of the settlor is misstated. The error is of no importance in itself, but tends to show that the case never received that careful attention which it deserved before being practically over-ruled.

among my relations who is the most fit and possesses integrity, temperance, intelligence, and respectability, and appears most deserving.

"3rd. After my decease, neither my heirs nor the *mutwalli* will have the smallest right to sell or give away or transfer the above-mentioned lands in any manner whatsoever. Part thereof [which ?] is expended in hereditable, charitable, and benevolent purposes, shall be disbursed under my own control and direction.. . ."

The document is brief and in parts obscure. It is not explained who is to determine the fittest successor to the mutawaliship, nor what is meant by "hereditable purposes," unless "hereditable and charitable purposes" means "charitable" purposes according to hereditary custom in the family. If the "hereditable" purposes are different from the "charitable" purposes, it is apparently left to the *mutawalli* for the time being to determine at his absolute discretion how much of the income shall be expended on "hereditable" and how much on "charitable" purposes. The natural inference is that the settlor cared very little about the ultimate destination of her property, but was chiefly intent on securing comfortable maintenance, on a footing of commensality, for herself and certain of her living relatives; but the declaration that her heirs shall have no power to alienate the land seems rather to imply that they also are expected to live on it and from it. Of the relatives mentioned, the son's son and son's daughter would inherit to the exclusion of the other three, supposing the *wakf* to be invalid. The Court, however, was not asked to set aside the deed, either on account of the vagueness of the ultimate trust or on account of its involving a "hereditable" element; nor were these points alluded to in the five questions put to the Maulawis. Thus the case is an authority so far as it goes, though of a negative and therefore inconclusive kind, for the legality of settlements in favour of unborn descendants. The actual decision, so far as it now concerns us, was based on the affirmative answer of the law-officers to the first question, which was "whether, according to Muhammadan Law, an endowment to *charitable* uses is valid, when qualified by a reservation of the rents and profits to the donor himself during his life ?" Thus by looking only at the issues actually raised and determined, and ignoring the negative implication from the contents of the deed which was upheld, the High Court of Calcutta was able to assert with verbal accuracy that this judgment "*does not declare* that a *wakf* which on the face of it is not an endowment to religious or charitable uses is valid," though the endowment which it declared to be valid was, as a matter of fact, directed principally and obviously to private ends.

Jewun Doss Sahoo.

Two years later came the first Privy Council ruling on the subject in *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*, 2 Moo., 390 (1840), already noticed under s. 317 as an authority for the proposition that the use of the term *wakf* is not absolutely necessary to the validity of a *wakf*, and now requiring notice as having been supposed to decide by implication that a charitable purpose (in the English sense) is absolutely necessary. What the case actually decides is, that proof of such a purpose is sufficient. The instrument in question, an ancient royal grant, describing itself as an *Altamgha-enam*, directed a specified annual sum to be paid out of the royal revenue from certain lands, to a certain "sanctified person," for him to manage and control, and to descend to his heirs in succession from remove to remove; but it began by saying that it was "endowed and bestowed for the purpose of defraying the expenses of his Khankah (monastery)," and in subsequent confirmatory grants the expenses of travellers visiting the Khankah were expressly mentioned, while on the other hand the expression occurred "to descend to the *offspring* in succession and to be enjoyed by them." The decision of the Sudder Dewanny Adawlut, which the P. C. confirmed, followed an earlier decision of the same Court in another suit by the same plaintiff in respect of the same endowment (*Kadira* v. *Shah Kubeer-ood-deen*, 3 S. D. A., 407), and in this prior suit the opinions

of the native law-officers, who were consulted had been contradictory, so that the judgment was based on earlier *fatwas*, and especially on that received and adopted by the S. D. A. in the very similar case of *Kulb Ali Hoossein* v. *Syf Ali*, which was to the effect that "the appropriation of land or other property to *pious and charitable purposes* is sufficient to constitute *wakf without* the express use of that term."

In neither of these cases was there any need to examine the *muftis* closely as to what they understood by the terms "religious and charitable," as the English meaning would clearly cover the facts. The P. C., who were content to follow these authorities with scarcely any independent research, probably did, as a matter of fact, understand the terms in the English sense, but they were not called upon to consider whether this was the only possible sense. The contrary decision in *Jaun Bibee* v. *Abdollah Barber*, which was given two years previously to their own judgment, but fourteen years after *Kadira* v. *Kubeer-ood-deen*, was not brought to their notice—probably because it did not touch the question as to the necessity for using the term *wakf*, to which their attention was just then chiefly directed. Hamilton's Hedaya was referred to only as to the definition of *wakf*, and the Fatawa Alamgiri (then and for many years afterwards untranslated) not at all.

We may notice in passing *Dalrymple* v. *Khoondkar Azeezul Islam*, S. D. A. (1858) 586, in which the Court seems to have considered that there could be such a thing as "heritable" property burdened with certain trusts, and yet not *wakf* property; and that this must be taken to be the arrangement where the office of *mutwalli* is hereditary and he has a beneficial interest in the endowed property; and, on the other hand, that property cannot be considered to be wholly *wakf* unless all the profits arising therefrom are devoted to religious purposes. As Muhammadan Law knows nothing of perpetuities in any other form than that of *wakf*, while they are certainly opposed to the general policy of the territorial law of British India, this doctrine was very properly repudiated in the later case of *Shoojat Ali* v. *Zumeer-ood-deen*, 5 W. R., 158 (1866), and the question now under discussion remained just where it was.

Dalrymple *v.* Khoondkar Azeezul Islam.

In *Bibee Kuneez Fatima* v. *Bibee Sahiba Jan*, 8 W. R., 313 (1867), the royal grant which was held not to be *wakf* was expressed to be for the support of the grantee's family and to enable him to bear the expenses of a *khankah* for travellers students, and mendicants, but no definite obligation was laid upon him to spend the income in any particular way; the word *wakf* was not used, nor any words implying that the property was not to be alienated. On any view, therefore, the decision was correct; but Kemp, J., chose to base it on the ground that there was "no dedication *solely* to the worship of God, or to any religious or charitable purpose," words which might be taken in either the English or the Muhammadan sense.

Bibee Kuneez Fatima.

The same judge, in a subsequent case (*Khojah Hossein Ali* v. *Shahzadee Hazara Begum*, 12 W.R., 344 (1869), incidentally let fall the manifestly inaccurate remark that "to provide for the poor is the primary object of every *wakf*," but substantially negatived the stricter interpretation of his previous *dictum* by supporting a *wakf* of which the avowed purpose was the subsistence of travellers and the poor *and the maintenance of the he rs of the grantor's late son;* and by which that individual, after spending an unspecified amount on the assistance of travellers, &c., was to take the whole residue for his personal expenses and those of two specified relatives. By this time the Fatawa Alamgiri had been translated by Baillie, and the effect was seen in the judge's admission that an endowment, or settlement, in favour of relations specifically named is in every respect a lawful one. The facts did not, however, raise the question, on which the F. A. is equally explicit, as to the validity of a *wakf* in favour of unborn descendants. Even as it was, however, Markby, J.,

Khojah Hossein Ali.

dissented from his colleague, and protested against " giving the least countenance to the notion that a disposition of property which really leaves the holder at liberty to enjoy it according to the ordinary mode of enjoyment by Muhammadans generally, is valid for the purpose of impressing upon the property the character of absolute unalienability, merely because it contains a vague and merely nominal appropriation to charitable purposes."

Muzhurool Huq.

In the following year, Kemp, J., gave effect to the same principle in the very similar case of *Muzhurool Huq* v. *Puhraj Ditarey Mohupattur*, 13 W. R., 255 (1870), represented by illustration (*a*) under s. 323, conceding, in a sentence often quoted, " that the mere charge upon the profits of the estate of certain items which must in *course of time necessarily* cease, *being confined to one family*, does not render the endowment invalid." The deed is not set out *verbatim* in the report, but from the judge's summary it would appear that the expenses to be defrayed out of surplus profits were those of the members of the family of the *mutwalli named*, not of the families of his successors.

Abdul Ganne Kasam.

Three years later, the validity of a family settlement pure and simple was for the first time plainly put in issue and distinctly negatived in *Abdul Ganne Kasam* v. *Hussen Miya Rahimtulla*, 10 Bom. H. C. (1873), and it is with this quite modern ruling that the adverse current of decisions really begins.

The deed in question, executed more than fifty years before, by a widow and her three sons, purported to make *wakf* of a house for themselves and their children and children's children and heirs, never to be sold or mortgaged. The extinction of ownership required by Muhammadan Law was expressly declared, but there was no pretence of any dedication for worship or charity. Melvill, J., on behalf of the Full Bench, rightly described it as " a perpetuity of the worst kind ; " pointed out (also quite correctly) that the spirit of the Muhammadan Law, if looked at apart from the institution of *wakf*, was against perpetuities ; and then proceeded to grapple, less successfully, with the authorities cited to show that they, nevertheless, are sanctioned in the form of *wakf*. He spoke of Abu Hanifa and the two disciples as hopelessly at variance, omitting to notice that both the standard authorities accessible to him declared unhesitatingly for the latter. Referring to the " opinion of Mr. Baillie " that the term *wakf* is more comprehensive than Hamilton's definition, and includes settlements on a person's self and children, he wholly ignored the fact that Mr. Baillie's footnote was no expression of opinion, but a simple reminder to the reader that the entire section of the Fatawa Alamgiri, which he was then translating treated of the settlements in question without a hint of any question as to their legality. He spoke of *this opinion* as apparently founded on that of Abu Yusuf, but in opposition to that of Muhammad, whereas in reality, as we have seen, the difference between the two disciples had no reference whatsoever to the intrinsic propriety of a settlement on descendants, but merely to the necessity for making formal provision against the contingency of the specified line becoming extinct. In this way the Court succeeded in convincing itself that " the balance of authority was in favour of the conclusion that to constitute a valid *wakf* there must be a dedication of the property *solely to the worship of God, or to religion, or to charitable purposes*," a conclusion which went much beyond what was necessary to support its decision, and was in flat contradiction to several previous rulings. Naturally the most was made of the P. C. ruling in *Jewun Doss Sahoo*, to the effect that " the appropriation of land or other property to pious and charitable purposes is sufficient to constitute *wakf*, without the express use of that term in the grant ; " and " we think," said Melvill, J., " that the converse of this proposition holds good, namely, that it is necessary, in order to constitute a *wakf*, that the endowment should be to religious and charitable uses, and that it is not sufficient that the mere term *wakf* should be present."

If intended for an argument, this was, of course, fallacious, as Ameer Ali has pointed out. The true principle may be, and I think is, that the essence of *wakf* is *perpetual immobilisation*, and that the declaration of a religious or charitable purpose is only one of several possible ways of indicating that perpetual immobilisation was intended.

The *dictum* in *Abdul Ganne Kasam* was quoted and adopted by the Calcutta High Court in *Mahomed Hamidulla Khan* v. *Lotful Huq*, 6 Cal. 744 (1881), a judgment severely, but not too severely, criticised by Ameer Ali in respect of its strange flounderings over the nature and relative values of the principal law-sources.* Yet while endorsing the extreme Bombay doctrine, and applying it to a deed which contained the ultimate dedication to the poor which was lacking in the Bombay case, the Court opened a loophole for future evasion by the suggestion that the settlements on descendants spoken of in Baillie's Digest might perhaps be valid if only the magic term *sadakah* were employed instead of *wakf*; the fact being that *sadakah* simply expresses what is implied in the definition of *wakf*, namely, an intention to please God by doing something which is beneficial to men, and that the words *wakf* and *sadakah* are used together or interchangeably throughout the section in question. Mahomed Hamidulla v. Lutful Huq.

Mahomed Hamidulla v. *Lotful Huq* represents the high-water mark of what I may call the Anglicising, or Anglo-Muhammadan, or anti-settlement, current. The maxim that the dedication must be *solely* to religious or charitable purposes was virtually disavowed by one of the two judges who enunciated it, in the subsequent case of *Luchmiput Singh* v. *Amir Alum*, 6 C. L. R. 164 (1882). There the *wakfnama* provided that the *mutawalli* should in the first place pay certain debts (thus benefiting the settlor himself), and then apply the income towards the support of a mosque and other specified religious uses, *and* the maintenance of the settlor's grandsons and their male issue (apparently *ad infinitum*). It came before the High Court on appeal from the Subordinate Judge, "a gentleman of considerable attainments in Arabic learning, who appears (said the High Court) to have entertained no doubt as to this *wakf* being of a thoroughly legitimate character. And, singularly enough, the only matter which strikes us as one which, with reference to the decisions of the Courts, makes the character of this alleged *wakf* at all doubtful, is the very one which the lower Court has treated as one as to which there could be no dispute as to its being a proper object of *wakf*." Referring to the provision for male descendants, and to the definition adopted in the two last-mentioned cases, the Court observed: "This definition might seem to exclude from judicial recognition a *wakf* of which one object is a provision for the family of the creator of it. The lower Court, however, easily disposes of this question by the observation that '*it is quite evident, and there is no necessity to quote any authority on the subject*, that a *wakf* for one's self and for one's children is valid.' In the Bombay case the judges, after considering all the available authorities on this question, held that the balance was in favour of the *dictum* to which they gave effect; and this, too, was that the Division Bench, of which one of us was a member decided in the case of *Mahomed Hamidulla Khan* v. *Budrunissa Khatun*." † Describing the nature of the deed in that case, the Court proceeded: "The *wakfnama* before us is of a very different character; and having regard to the passage in it reciting the fact of dedication, we think that, *without saying whether or no we are prepared on further consideration to adopt to the full the ruling above mentioned*, we can treat this *wakf* as actually fulfilling the condition described (of being devoted *solely* to religious or charitable purposes?)" The Court drew, Luchmiput Singh.

* M. L. vol. i, pp. 182, 249, citing from 8 C. L. R., 164, and in the first-mentioned place under the name *Mahomed Hamidulla* v. *Budrunnissa Khatun*.

† *Mahomed Hamidulla* v. *Lotful Huq* is reported under this name in 8 C. L. R, 864.

in fact, a somewhat subtle distinction between "the objects of the *wakf*, as declared in the dedicatory part of the deed," and "the subsequent direction" that the manager should maintain the future male descendants of the settlor. "Whether or not the provision or direction can be lawfully carried out, it is not necessary now to decide. But, apart from this, we are of opinion that the *wakf* was completed by the passage which we have quoted." In the meantime there had been a more distinct reaction on the other side of India. In

Fatma Bibi.

Fatma Bibi v. *Advo.-Genl. of Bombay*, 6 Bom., 42 (1881),* the opinion was expressed (extra-judicially as was afterwards considered) that if there be an ultimate dedication to a pious and unfailing purpose, an intermediate settlement on the founder's children and their descendants is not invalid; and this opinion was followed judicially in *Amrutlal Kalidas* v. *Shaik Hussein*, 11 Bom., 492 (1887),† as being conformable to Baillie's version of the Fatawa Alamgiri, though not conformable, in the judge's opinion, either to the general trend of decided cases or to public policy. The necessity for the ultimate pious purpose to be expressed, and not left to be implied, was re-affirmed by the Bombay High Court and the P. C. in *Nizamuddin* v. *Abdul Gafur*, 13 Bom., 264 (1888) ‡: no fresh reason, however, being adduced why the opinion of Abu Hanifa and Muhammad should be preferred to that of Abu Yusuf, contrary to what is, as we have seen, implied in the Hedaya and expressly stated in the Fatawa Alamgir. And so we are brought down to the Privy Council decisions which have settled the law prior to 1913, as stated in the text (s. 323). In these the only passage which grapples directly with the original authorities is the following, taken from the judgment in *Abul Fata* v. *Rasamaya*, 22 Cal. at p. 631 :—

Amrutlal Kalidas.

Nizamuddin *v.* Abdul Gafur.

Abdul Fata *v.* Rasamya.

"The opinion of that learned Muhammadan lawyer (Ameer Ali) is founded, as their Lordships understand it, upon texts of an abstract character, and precedents very imperfectly stated. For instance, he quotes a precept of the Prophet Mahomet himself to the effect that 'a pious offering to one's family to provide against their getting into want, is more pious than giving alms to beggars. The most excellent of *sadakah* is that which a man bestows upon his family.' And by way of precedent he refers to the gift of a house in *wakf* or *sadakah*, of which the revenues were to be received by the descendants of the donor Arkam. His other old authorities are of the same kind. As regards precedents, their Lordships ought to know a great deal more in detail about them before judging whether they would be applicable at all. They hear of the bare gift and its maintenance, but nothing about the circumstances of the property—except that in the case cited the house seems to have been regarded with special reverence—or of the family, or of the donor. As regards precepts, which are held up as the fundamental principles of Mahomedan Law, their Lordships are not forgetting how far law and religion are mixed up together in the Mahomedan communities; but they asked during the argument how it comes about that by the general law of Islam at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions, that is, of inalienable life-interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as *wakf*, in the name of God, or for the sake of the poor. To those

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* Represented by illustration (*f*) under s. 323.

† Illustration (*e*) under s. 323.

‡ Illustration (*b*) under s. 323.

questions no answer was given or attempted, nor can their Lordships see any. It is true that the donor's absolute interest in the property is curtailed and becomes a life-interest; that is to say, the *wakfnama* makes him take as *mutwalli* or manager. But he is in that position for life; he may spend the income at his will, and no one is to call him to account. The amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the family, and indeed is necessary for the immediate accomplishment of such a design."

Brushing aside the suggestion that the case was not to be decided according to Muhammadan Law, the judgment proceeded—

"Their Lordships have endeavoured, to the best of their ability, to ascertain and apply the Muhammadan Law, as known and administered in India; but they cannot find that it is in accordance with the absolute, and as it seemed to them extravagant, application of certain precepts taken from the mouth of the Prophet. Those precepts might be excellent in their proper application. They might, for all their Lordships knew, have had their effect in moulding the law and practice of *wakf*, as the learned judge said they have. But it would be doing wrong to the great lawgiver to suppose that he was thereby commending gifts for which the donor exercised no self-denial; in which he took back with one hand what he appeared to put away with the other; which were to form the centre of attraction for accumulations of income and further accessions of family property; which carefully protect so-called managers from being called to account; which seek to give to donors and their family the enjoyment of property, free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words."

The strong point in the above argument is the apparent inconsistency between the strictness of the Islamic law of gift and bequest compared with the wide range claimed for *wakf*. In the first edition I was disposed to allow the reality of this inconsistency, while holding, nevertheless, that Ameer Ali had proved his point as to the actual opinions and practice of the mediæval lawyers. I am now inclined to think it quite possible for both views to present themselves as true to the same mind at the same time, though whether they were actually so present to the mind of "the great lawgiver" may be doubtful.

To take first the law of gifts: The general idea of *hiba* seems to me to be indicated by its association in the text-books with *hiba bil iwaz* and *hiba ba shar ul iwaz*, transactions which the modern jurist would assign to quite a different category, and with the saying of the Prophet, "Send ye presents *to each other* for the increase of your love." The two compound phrases being used to describe transfers of property in consideration of a *definite return*, immediate or future, *hiba* simply is a gift in expectation of an *indefinite return*, either in the shape of a similar gift on the next suitable occasion, or in the shape of kindly feeling, respect, and good offices. There are good reasons for insisting that presents of this kind, intended to oil the wheels of social intercourse, should be made in the most direct and simple form, lest they should tend to the increase of disputes and litigation rather than of mutual love.

As to the restrictions on the power of bequest, the mischief against which they are directed is the indulgence of weak personal preferences by sick and dying persons at the expense of those whom the law marks out as having the best claim on the score of consanguinity. They reproduce in a more rigidly imperative form the loose Koranic precept—"bequeath equitably to parents and kindred." It was not the exaggeration, but the undue neglect, of the duty of keeping family property within the family, against which the inventors of

these rules were on their guard. These same law-makers, whoever they may have been, might naturally look with quite different eyes on a person deliberately divesting himself once for all of the power of alienation, converting himself at best into a life-renter, and declaring that he placed this restraint on his own caprice, not in order to gain favour with any one from whom he might expect a return, but in the belief that he would please God by making permanent provision for his descendants. It is quite true that such transactions are open to another, and from the modern point of view very serious, objection, as placing property permanently under dead instead of living control, and preventing alienations which would be mutually advantageous to vendor and purchaser. But among those modern thinkers (including the present writer) who condemn perpetual entails, there are not a few (myself again included) who object nearly if not quite as strongly to perpetual endowments for public purposes described as charitable or religious ; at all events, unless the founder's wishes are freely set aside whenever they are opposed to general convenience. It does not follow, because English Law happens to have reached the particular stage at which private perpetuities have been abolished, while public perpetuities are protected under certain conditions, that we should insist on attributing, without evidence, the same somewhat arbitrary distinction to the jurists of Islam. If the former are inconsistent with the Muhammadan Law of gifts and bequests, so are the latter ; and as it is admitted that *wakfs* for public purposes were legal at the date of the Hedaya and considerably earlier, there seems to be no reason why we should not allow, on substantially the same evidence, the legality of private settlements. * It is a question of merely historical interest whether either or both of these institutions can, as Ameer Ali thinks, be traced back to the earliest days of Islam. I am disposed to doubt this, because of the difficulty of accounting on that supposition for the wide and deep divergences on the subject among the different schools, and between Abu Hanifa and his disciples. Thus the Malikis allow a temporary *wakf*, even for so short a period as a single year, and hold that in any case the legal ownership remains in the endower and his heirs throughout, and is re-united with the right of actual enjoyment on the expiration of the specified term or on failure of the specified objects.† The doctrine of Abu Hanifa stands, as we have seen, half-way between this extreme and the ultimately accepted view of Abu Yusuf ; treating *wakf* as, in the first instance, a sort of revocable loan without a determinate borrower, but as capable of becoming irrevocable by judicial decree on the death of the *wakif*. The Shias, again, treat it as primarily a contract between the founder and one or more living beneficiaries, conferring on them a usufructuary right which may or may not devolve on their descendants, and regard provisions for public objects as more or less permissible deviations from the normal type.

As to the advice given by the Prophet to Omar, concerning his land at Khaibar, the very important variations in the different reports thereof render it unsafe to infer anything beyond a slight probability that the principle of immobilisaton of property by the act of the owner for some pious purpose did receive some sort of sanction from the founder of Islam. As quoted in the Hedaya it is simply " dedicate to charity the root, or *corpus* (*tasadak bi'l aslha*), so that it shall not be sold, nor inherited nor gifted." Clavel (*wakf*, vol. i, p. 19) gives, as from Al Bokhari's great collection of traditions of the 3rd century A. H., " Immobilise it so that, etc. (as above) . . . *and distribute the revenues thereof to the poor.*" Messrs. Sautayra and Cherbonneau quote from the same source to much the same effect ; and it is partly on the strength of this very passage

* It is curious that the Russian Professor de Nauphal, who by no means errs on the side of excessive respect for Muhammadan Law in general, bestows his unqualified approval on this device as " a most rational and happy solution of an economic problem which must have often troubled parents, solicitous about the future of their descendants."

† See Perron, Jurisprudence Musulmane, vol. v, pp. 42, 45, 53, 56.

that these writers distinguish the *Schéry*, or divinely ordained, from the *Adi* or customary, *wakf*, and consider the latter to be of purely human institution, posterior to the time of the Prophet, and freely modified to suit varying social conditions. It is only in the sources relied on by Mr. Ameer Ali, *viz.*, the *Jamaa-i-Tirmizi*, through the *Ghait ul Bayan*, that we find the last clause amplified into—'*devote its* produce *to your children, your kindred and the poor in the way of God.*"

The Act of 1913.

Without stopping to consider the later decisions, which have been duly incorporated in their places in the Digest, we shall now set out the full text of the Act of 1913, and add a brief commentary.

Mussulman Wakf Validating Act, No. VI of 1913

[*7th March*, 1913].

An Act to declare the rights of Mussalmans to make settlements of property by way of "*Wakf*" in favour of their families, children, and descendants.

Whereas doubts have arisen regarding the validity of *wakfs* created by persons professing the Mussalman faith in favour of themselves, their families, children, and descendants, and ultimately for the benefit of the poor or for other religious, pious, or charitable purposes; and whereas it is expedient to remove such doubts; Is is hereby enacted as follows:—

Short title and extent.

1. (1) This act may be called the Mussalman *Wakf* Validating Act, 1913.

(2) It extends to the whole of British India.

Definitions.

2. In this Act unless there is anything repugnant in the subject or context.

(1) "*Wakf*" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious, or charitable.

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the texts and doctrines of the Hanafi school of Mussalman Law.

Power of Mussalmans to create certain *wakfs*.

3. It shall be lawful for any person professing the Mussalman faith to create a *wakf* which in all other respects is in accordance with the provisions of Mussalman Law, for the following among other purposes:—

(*a*) for the maintenance and support wholly or partially of his family, children, or descendants, and

(*b*) where the person creating a *wakf* is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious, or charitable purpose of a permanent character.

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.

4. No such *wakf* shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious, or charitable purpose of a permanent nature is postponed until after the extinction of the family, children, or descendants of the person creating the *wakf*.

Serving of local and sectarian custom.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

NOTES.

Pre-amble. The Act, as the Statement of Objects and Reasons (Gazette of India, 1911, V, 107) stated, is not intended to codify or define the general law of *wakf*, which must be governed by Muhammadan Law. Its object is merely declaratory, to remove the " disability and hardship " and the doubts created by the decisions in the Privy Council ruling in *Abul Fata*, 22 Cal., 619 (1894), which confirmed the P. C. decisions in *Mahomed Ahsanulla*, 17 Cal., 498 (1889), and *Abdul Gafur*, 17 Bom., 1 (1892). The doubts raised were : (1) what would be the ultimate " substantial dedication " to charitable, religious, or pious uses, which would save a family *wakf* from being invalid ? and (2) at what remote point of time would such dedication render the *wakf* invalid ? The answer to the first question will be found in the proviso to s. 3, and to the second, in s. 4 of the Act.

Sec. 1. The Act does not name a date for its commencement. It therefore came into force on the date it was passed, *viz :* 7th March, 1913. In its passage through Council, a private member (Mr. Ghuznavi) tried to get a retrospective clause inserted, but was reconciled to the omission of a retrospective clause on the understanding that the Act was declaratory, and courts would now interpret the law as applied to *wakfs* between 1894 and 1913 in the light of this Act and not in the light of the Judgment of the Privy Council of 1894. This, however, is incorrect. The Act does not apply to *wakfs* created before it was passed ; *Amirbibi* v. *Azizabibi* (1914), 39 Bom., 563 ; *Ramanandan* v. *Vava Levvai* (1916), 40 Mad. 116, P. C., at p. 121 ; nor to a *wakf* which was already declared invalid in a former adjudication ; *Mahomed Buksh* v. *Dewan Ajman* (1915), 43 Cal., 158.

Sec. 2. (1) See above, last two paras. of secs. 1 to n. 317, as to the words " permanent dedication " and their applicability to Maliki law.

" Religious, pious, or charitable " purposes include those mentioned in secs. 3 and 4.

" Any property "—See last para. of secs. 2 to n. 318 (4).

Sec. 3.—The wording of this section refers clearly to *wakfs* created after the date the Act comes into force, although the Preamble, which is inconsistent with it, might appear to imply that *wakfs* of an earlier date, at least those not already adjudicated upon, might be governed by this Act. But more than one ruling has settled the law that the Act is not retrospective. See note to sec. 1 above.

Does the Proviso to this sec. apply to both clauses (*a*) and (*b*), or to clause (*b*) only ? The better construction is to apply it to both clauses. In that case the word " wholly " in clause (*a*) would refer to a limited period of time, however long ; the ultimate benefit being reserved for the poor, or for a religious, pious, or charitable purpose. But by the definition of *wakfs* in the Act, the maintenance of the family (for any Muslim) and also of one's self (for the Hanafis) would seem to be included among religious, pious, or charitable uses !

APPENDIX C.

The Statutory Law of Pre-emption in the Panjab and Oudh.
(See s. 353.)

I. *Pre-emption under the Panjab Act, I of* 1913.

A brief analysis of the Panjab Pre-emption Act, 1913, may be useful to the general practitioner.

Sec. 3 contains definitions. The influence of the Panjab Alienation of Land Act, XIII of 1900, and of the Punjab Land Revenue Act, XVII of 1887, marks off the pre-emption law of this province from that of other provinces in India. Land may fall into one of *three* classes: (1) agricultural land, (2) village immovable property, and (3) urban immovable property. The privileges attached to members of agricultural tribes have an important bearing on the Panjab law of pre-emption. The right of pre-emption is defined in sec. 4; it arises in agricultural land only out of sales, but in immovable property out of sales or foreclosures. It exists in respect of agricultural land and village immoveable property, and with limitations, in respect of urban immovable property; but in all cases, it is subject to the statutory provisions in the Act (Secs. 5-7). It is generally excluded from cantonments and other local areas which may be notified by Government, (sec. 8)—Agricultural tribes are grouped together so that members not within a given group may not claim pre-emption within that group. (sec. 14). Secs. 15-18 define the persons in whom the right of pre-emption vests in varying circumstances. Secs. 19-29 describe the procedure; including a provision that vendors may give notice through courts to all parties interested; that would-be pre-emptors must give notice within three months of the vendor's notice; and that suits may be brought when sales have been completed. Sec. 30 provides a year's limitation to pre-emption-suits, and the dates from which the periods are to be computed, in different cases, when not provided for by Art. 10, Sched. I of the Indian Limitation Act, IX of 1908.

II. *Pre-emption under the Oudh Laws Act, XVIII of* 1876, *Secs.* 6-15.

The Oudh Law of Pre-emption is much simpler. It presumes the right of pre-emption within village boundaries, including the village site, in all village communities, proprietary or under-proprietary, unless a custom or contract to the contrary is proved (sec. 7). In towns or cities it is not presumed, but may be proved (sec. 8). Sec. 9 defines the order in which the right may be exercised by co-sharers or (if the tenure is under-proprietary) by superior proprietor sec. 10 provides that the vendor shall give notice through the court to the persons concerned; and sec. 11, that the would-be pre-emptor must pay or tender the price within three months of the vendor's notice. Sec. 12 deals with pre-emptions on preclosure of a mortgage. Pre-emption-suits are regulated by secs. 13-15

The term " Mahal," as used in sec. 9 of the Act, is not defined in the Act itself, but has been judicially interpreted to mean a parcel or parcels of land which have been separately assessed to or are held under a separate engagement for the revenue and for which a separate record of rights has been prepared : *Sheoraj Kunwar*, L. R. 37, I. A., 124 (1910).

APPENDIX D.

The Koranic Basis of Anglo-Muhammadan Law.

The following extracts constitute, so far as I have been able to ascertain, the only portions of the Koran which have any direct bearing on the topics treated in this Digest, whatever indirect instruction may have been extracted from other texts by the ingenuity of commentators. The student will gain a better idea of the relation of the foundation to the superstructure if he is able to take in at a glance the whole of the undoubted injunctions of Muhammad—or as a devout Moslem would say, of Allah Himself—on these topics.

I have mainly (but not entirely) followed Sale's translation, in which the words supplied by way of explanatory gloss are scrupulously indicated by italics: a method from which we gain a lively impression of the abruptness and obscurity of the original, and of the extent to which we are dependent on tradition for its interpretation.

It will be observed that the Koran is most copious on Marriage and Divorce, most precise in its rules of Inheritance, while it is entirely silent concerning Gift, Endowment and Pre-emption, the three subjects which give rise to the bulk of modern Anglo-Muhammadan case-law. This will not surprise any one who reflects on the conditions under which Muhammad judged and legislated at Medina.* When he was just recommending the use of written contracts as a novelty, and was still taking for granted that wills would be made orally if at all; when the very existence of Islam appeared to depend upon his life, and regular Courts of Justice were hardly beginning to be thought of, it seems very unlikely that his followers would trouble him with questions about the creation of legal perpetuities. Nor would there be much occasion for claims of pre-emption at a time when very few Moslems were agriculturists, and before the new rules of Inheritance had, had time to produce the inconvenience of excessive sub-division. For the same reasons one may be excused for receiving with some degree of suspicion the traditions, preserved in the Hedaya and other commentaries, which affect to connect the Prophet with these institutions.

Sura II, Verses 180—182.

† 180. It is ordained you, when any of you is at the point of death, if he leave any goods, *that he bequeath* a legacy to his parents, and kindred, according to what shall be reasonable. This is a duty *incumbent* on those who fear God. Legacies. See Chap. IX

181. But he who shall change *the legacy*, after he hath heard it *bequeathed by the dying person*, surely the sin thereof shall be on those who change it, for God is He who heareth and knoweth.

182. Howbeit he who apprehendeth from the testator any mistake or injustice, and shall compose *the matter* between them, that shall be no crime in him, for God is gracious and merciful.‡

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* See my Introduction to the Study of Anglo-Muhammadan Law, chap. i, pp. 10 15.

† In order to reconcile with this passage the doctrine of the Hanafi school, that a bequest to any one of the legal heirs is void unless the other heirs consent (s. 272), we must take it that the rules of inheritance, as subsequently revealed, were intended to define precisely what would be a reasonable legacy to parents and kindred, and at the same time to provide by law for a distribution in those proportions where the deceased had failed to do so.

Mr. Wherry tells us that some Moslem commentators understood the sentence which is here translated—"this is a duty incumbent on those who fear God"—to mean "there is a duty towards religious mendicants" [namely, to bequeath to them a portion of the property]; but it seems that these same commentators hold the injunction to have been abrogated by the rules of inheritance subsequently revealed [Sura IV].

‡ The commentators seem not to be agreed as to whether this last sentence is meat, to provide for the correction, after the testator's death, of a will made contrary to lawn or merely for friendly remonstrance with the testator in his lifetime. See Wherry, *ad loc.*

II, 221.

Difference of religion. See s. 39.

Marry not *women who are* idolaters, until they believe; verily a maid servant who believeth is better than an idolater, though she please you *more*. And give not *women who believe* in marriage to the idolaters, until they believe; for verily a servant who is a true believer is better than an idolater, though he please you *more*. They invite unto *hell* fire, but God inviteth unto paradise and pardon through His will, and declareth His signs unto men, that they may remember.

II, 226—237.

Ila. s. 65.

226. They who vow *to abstain* from their wives are *allowed* to wait four months; but if they go back *from their vow*, verily God is gracious and merciful.

227. And if they resolve on a divorce, God is he who heareth and knoweth.

Iddat. s. 31.

228. The *women who are* divorced shall wait concerning themselves until they have had their courses thrice, and it shall not be lawful for them to conceal that which God hath created in their wombs, if they believe in God and the last day; and their husbands will act more justly to bring them back at this *time*, if they desire a reconciliation. The women ought also *to behave towards their husbands* in like manner as *their husbands should behave* towards them; but the men ought to have a superiority over them.* God is mighty and wise.

Divorce not immediately irrevocable unless thrice repeated. s. 63. The Khula divorce. Ss. 60, 69.

229. Ye may divorce *your wives* twice; and then either retain them with humanity or dismiss *them* with kindness. But it is not lawful for you to take away anything of what ye have given them, unless both fear that they cannot observe the ordinances of God. And if ye fear that they cannot observe the ordinances it shall be no crime in either of them on account of that for which *the wife* shall redeem herself. These are the ordinances of God, therefore transgress them not; for whoever transgresseth the ordinances of God, they are unjust doers.

Conditions of re-union with a thrice-divorced wife. s. 78 (6).

230. But if *the husband* divorce her *a third time*. she shall not be lawful for him again, until she marry another husband. But if he *also* divorce her, it shall be no crime in them if they return to each other, if they think they can observe the ordinances of God; and these are the ordinances of God. He declareth them to people of understanding.

Retention is permitted after first or second divorce, s. 63.

231. But when ye divorce women, and they have fulfilled their prescribed time, either retain them with humanity or dismiss them with kindness; and retain them not with violence, so that ye transgress; for he who doth this surely injureth his own soul. And make not the signs of God a jest, but remember God's favour towards you, and that He hath sent down unto you the book *of the Koran*, and wisdom, admonishing you thereby; and fear God, and know that God is omniscient.

A divorced woman may take another husband. s. 78 (2).

232. But when ye have divorced *your* wives, and they have fulfilled their prescribed time, hinder them not from marrying their husbands, when they have agreed among themselves according to what is honourable. This is given in admonition unto him among you who believeth in God, and in the last day. This is most righteous for you, and most pure. God knoweth, but ye know not.

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* In Palmer's translation this sentence is connected with the preceding one. "For the same is due to them as from them; but the men should have precedence over them."

233. Mothers *after they are divorced* shall give suck to their children two full years, to him who desireth the time of giving suck to be completed; and the father shall be obliged to maintain them and clothe them *in the meantime*, according to that which shall be reasonable. No person be obliged beyond his ability. A mother shall not be compelled *to what is unreasonable* on account of her child, nor a father on account of his child. And the heir *of the father* shall be obliged to do in like manner. But if they choose to wean *the child before the end of two years*, by common consent and on mutual consideration, it shall be no crime in them. And if ye have a mind to provide a nurse for your children, it shall be no crime in you, in case ye fully pay what ye offer *her*, according to that which is just. And fear God, and know that God seeth whatever ye do.

Duty of divorced parents to infant children.

234. Such of you as die and leave wives, *their wives* must wait concerning themselves four months and ten *days*, and when they shall have fulfilled their term, it shall be no crime in you for that which they shall do with themselves, according to what is reasonable. God well knoweth that which ye do.

The iddat, s. 31.

235. And it shall be no crime in you, whether ye make public overtures of marriage unto *such* women, *within the said four months and ten days*, or whether ye conceal *such your designs* in your minds: God knoweth that ye will remember them. But make no promise unto them privately, unless ye speak honourable words; and resolve not on the knot of marriage, until the prescribed time be accomplished; and know that God knoweth what is in your minds, therefore beware of Him, and know that God is gracious and merciful.

236. It shall be no crime in you, if ye divorce your wives, so long as ye have not touched them, nor settled any dowry on them. And provide for them (he who is at his ease must *provide* according to his circumstances, and he who is straitened according to his circumstances) necessaries, according to what shall be reasonable. *This is* a duty *incumbent* on the righteous.

Divorce before consummation. The matat, s. 78 (4).

237. But if ye have divorced them before ye have touched them, and have already settled a dowry on them, *ye shall give them* half of what ye have settled, unless they release *any part*, or he release *part* in whose hand the knot of marriage is *; and if ye release *the whole*, it will approach nearer unto piety. And forget not liberality among you, for God seeth that which ye do.

II, 240—241.

240. And such of you as shall die and leave wives ought to bequeath their wives a year's maintenance, without putting them out *of their houses;* but if they go out *voluntarily*, it is no crime in you for that which they shall do with themselves, according to what shall be reasonable; God is mighty, and wise.

Widows and divorced wives to be maintained for a time.†

241. And unto those who are divorced a reasonable provision *is also due; this is* a duty *incumbent* on those who fear *God.* ‡

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* It seems natural to take these words as referring to the guardian who contracted the marriage on behalf of the woman; but both Sale and Palmer understand the meaning to be—" or unless the husband chooses to surrender the half which he might have reserved; " in other words, to pay the whole of the stipulated dower.

† See, as to widows, note 3 under s. 59, and as to divorced wives, s. 78 (5)

‡ There are two other passages in this Sura, *viz.*, verses 276-279 (usury) and verses 283, 284 (use of writing and witnesses in contracts), which would be very important if the Muhammadan contract law were still enforced by the Civil Courts of British India; but even in the Presidency Towns it is no longer so as regards any point touched by these texts. See under s. 3, *ante.*

IV, 1—6.

1. O men, fear your Lord, who hath created you out of one man, and out of him created his wife, and from them two hath multiplied many men and women; and fear God by whom ye beseech one another, and *respect* the wombs, for God is watching over you.

Restitution to orphan minors, s. 137 and note.

2. And give the orphans their substance; and render them not in exchange bad for good; and devour not their substance by adding it to your substance, for this is a great sin.

Limit to the number of wives, s. 32.

3. And if ye fear that ye shall not act with equity towards orphans *of the female sex*, take in marriage of such *other* women as please you, two, or three, or four, *and not more;* but if ye fear that ye cannot act equitably *towards so many*, *marry* one *only*, or the slaves which ye shall have acquired.* This will be easier, that ye swerve not *from righteousness.*

4. And give women their dowry freely; but if they voluntarily remit unto you any part of it, enjoy it with satisfaction and advantage. †

Guardianship of the property of minors, ss. 91, 115, 137, and notes.

5. And give not unto those that are weak of understanding the substance which God hath appointed you to preserve *for them*, but maintain them thereout, and clothe them, and speak kindly unto them.

6. And examine the orphans until they attain *the age of* marriage; but if ye perceive they are able to manage their affairs well, deliver their substance unto them; and waste it not extravagantly, or hastily, because they grow up. Let him who is rich abstain *entirely from the orphans' estates:* and let him who is poor take *thereof* according to what shall be reasonable. And when ye deliver their substance unto them, call witnesses *thereof* in their presence; God taketh sufficient account *of your actions.*

IV, 1—12.

Inheritance: general directions in favour of orphan children, kindred, and the poor.

7. Men ought to have a part of what *their* parents and kindred leave *behind them when they die*, and women *also* ought to have a part of what their parents and kindred leave, whether it be little or whether it be much; a determinate part *is due to them.*

8. And when they who are of kin are present at the dividing *of what is left*, and also the orphans and the poor, distribute unto them *some part* thereof; and *if the estate be too small*, at least speak comfortably unto them.

9. And let those fear *to abuse orphans*, who, if they leave behind them a weak offspring, are solicitous for them: let them therefore fear God, and speak that which is straight-forward.

10. Surely they who devour the possessions of orphans unjustly, shall swallow down nothing but fire into their bellies, and shall broil in raging flames.

11. God hath *thus* commanded you concerning your children.

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* Palmer's more literal translation of this important sentence is given under s. 32, *ante.*

† For Palmer's translation, see under s. 41, *ante.*

A male shall have as much as the share of two females; but if they be females *only*, *and* above two *in number*, they shall have two-third parts of what *the deceased* shall leave; and if there be but one, she shall have the half.

Specific rules. Children, See ss. 212, 213, 225.

And the parents *of the deceased* shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part. And if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath, and his debts *be paid*. Ye know not whether your parents or your children be of greater use unto you. *This is* an ordinance from God, and God is knowing and wise.

Parents, ss. 214, 215.

12. Moreover, ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and the debts *be paid*. They also shall have the fourth part of what ye shall leave, in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath, and your debts *be paid*.

Husbands and wives, ss. 210, 211.

And if a man or woman's *substance* be inherited by a distant relation, and he *or she* have a brother or sister; each of them two shall have a sixth part *of the* estate. But if there be more than this *number*, they shall be *equal* sharers in a third part after *payment of* the legacies which shall be bequeathed, and the debts, without prejudice *to the heirs*. *This is* an ordinance from God; and God is knowing and gracious.

Brothers and sisters (uterine), s. 221.

IV, 15.

If any of your women be guilty of whoredom, produce four witnesses from among you against them, and if they bear witness *against them*, affordeth them in *separate* apartments until death release them, or God imprison them a way *to escape*. [Then follows an obscure passage, which some understand as referring to sodomy.]

Punishment and evidence of fornication or adultery. See under s. 52.

IV, 19—25.

19. O true believers, is it not lawful for you to be heirs of women* against their will nor to hinder them *from marrying others*, that ye may take away part of what ye have given them *in dowry*, unless they have been guilty of a manifest crime; but converse kindly with them. And if ye hate them, it may happen that ye hate a thing wherein God hath placed much good.

Women not to be coerced or defrauded. See s. 93.

20. If ye be desirous to exchange a wife for *another* wife, and ye have already given one of them a talent; take not away anything therefrom; will ye take it by slandering *her* and *doing her* manifest injustice?

21. And how can ye take it, since one of you hath gone in to the other, and they have received from you a firm covenant?

22. Marry not women whom your fathers have had to wife (except what is already past); for this is uncleanness, and an abomination, and an evil way.

Prohibited degrees of consanguinity, affinity, and fosterage, ss. 34-38.

* So in Sale's translation; but the better rendering seems to be—"to inherit women," *i.e.*, to take possession of the wife or daughter of a deceased relative as part of his assets, and either marry her or dispose of her in marriage for a consideration.

23. Ye are forbidden to *marry* your mothers, and your daughters, and your sisters, and your aunts both on the father's and on the mother's side, and your brother's daughters, and your sister's daughters, and your mothers who have given you suck, and your foster-sisters, and your wives' mothers, and your step-daughters * which are under your tuition, *born* of your wives unto whom ye have gone in (but if ye have not gone in unto them it shall be no sin in you to *marry them*), and the wives of your sons who *proceed* out of your loins; and *ye are also forbidden* to take to wife two sisters, except what is already past; for God is gracious and merciful.

24. *Ye are* also *forbidden to take to wife* free women *who are married*, except those whom your right hands shall possess as slaves. † *This is* ordained you from God. Whatever is besides this is allowed you; that ye may with your substance provide *wives* for yourselves, acting that which is right, and avoiding whoredom. And for the advantage ye receive from them, give them their reward, according to what is ordained; but it shall be no crime in you to make any other agreement among yourselves after the ordinance *shall be complied with;* for God is knowing and wise.

Dower may be remitted or modified with wife's consent.

25. Whoso among you hath not means sufficient that he may marry free women who are believers, *let him marry* such of your maid-servants whom your right hands possess, as are true believers; for God well knoweth your faith. Ye are the one from the other; therefore marry them with the consent of their people, and give them their dower according to justice; *such as are* modest, not guilty of whoredom, nor entertaining lovers. And when they are married, if they be guilty of adultery, they shall suffer half the punishment which *is appointed* for the free women. This is allowed unto him among you, who feareth to sin; but if ye be patient, *it will be* better for you; God is gracious and merciful.

Marriage with slave women permitted, but not recommended.

IV, 32—35.

32. Covet not that which God hath bestowed on some of you preferably to others. Unto men *is* a portion of what they have earned, and unto women *is* a portion of what they have earned; therefore ask God of his bounty; for God is omniscient.

Both sexes to have the benefit of Inheritance. See Chap. VIII.

33. We have appointed every one kindred, to *inherit part* what their parents and relations shall leave *at their deaths*. And unto those with whom your right hands have made an alliance, give their part *of the inheritance*, for God is witness of all things.‡

Succession by contract (*v*). s. 262.

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* "Daughters-in-law" in Sale's translation, evidently by an oversight.

† The exception means that a Moslem may marry the freeborn wife of a hostile infidel, taken captive without her husband.

‡ This passage would seem on the face of it to imply that where two men had made a contract of brotherhood, each would take *some* share in the inheritance of the other, even as against heirs by consanguinity; but this is not the rule which ultimately prevailed among either Sunnis or Shias. See s. 262, *ante*. Probably this verse was originally published while the rule laid down in K. viii. 72, was in force. "They who have believed, and have fled their country, and employed their substance and their persons in fighting for the religion of God (*Mohajirun*), and they who have given the Prophet a refuge among them and have assisted him, these shall be deemed the one nearest-of-kin to the other. But they who have believed, and have *not* fled their country, shall have no right of kindred at all with you, until they also fly." If so, it is, with the latter, repealed by the text which was revealed eighteen months later, but which now stands as viii. 75: "Those who are related to each other by consanguinity shall be deemed the nearest-of-kin to each other preferably to strangers according to the Book of God;" and still more distinctly by S. xxxiii, v. 6: "Those who are related by consanguinity are nigher of kin the one of them unto the others, according to the Book of God, than the true other beilevers, and than the Mohajirun; unless that ye do what is fitting and reasonable unto your friends;

34. Men shall have the pre-eminence above women, because of those *advantages* wherein God hath caused the one of them to excel the other, and for that which they expend of their substance *in maintaining their wives*. The honest women *are* obedient, careful in the absence *of their husbands*, for that God preserveth them *by committing them to the care and protection of men*. But those whose perverseness ye shall be apprehensive of, rebuke; and remove them into separate apartments, and chastise them. But if they shall be obedient unto you, seek not an occasion of *quarrel* against them; for God is high and great.

Marital pre-eminence and authority. s. 51, and commentary.

35. And if ye fear a breach between the *husband and wife*, send a judge out of his family, and a judge out of her family; if they shall desire a reconciliation, God will cause them to agree; for God is knowing and wise.

IV, 127—130.

127. They will consult the concerning women: Answer, God instructeth you concerning them, and that which is read to you in the book *of the Koran* * concerning female orphans, to whom ye give not that which is ordained them, neither will ye marry them, and concerning weak infants, and that ye observe justice towards orphans; whatever good ye do, God knoweth it.

Guardians warned not to abuse their power.

128. If a woman fear ill-usage, or aversion from her husband, it shall be no crime in them if they agree the matter amicably between themselves; for a reconciliation is better *than a separation*. *Men's* souls are naturally inclined to covetousness; but if ye be kind *towards women*, and fear *to wrong them*, God is well-acquainted with what ye do.

Khula. Ss. 60, 69.

129. Ye can by no means carry yourselves equally between women *in all respects*, although ye study to do it; therefore turn not *from a wife* with a *manner of* aversion, nor leave her like one in suspense; if ye agree, and fear *to abuse your wives*, God is gracious and merciful.

130. But if they separate, God will satisfy *them* both of his abundance for God is extensive *and* wise, and unto God *belongeth* whatsoever is in heaven and on earth.

IV, 176.

They will consult thee *for thy decision in certain cases;* say *unto them*, God giveth you *these* determinations, concerning the more remote † degrees of kindred. If a man die without issue, and have a sister, she shall have the half of what he shall leave; and he shall be heir to her in case she have no issue. But if there be two *sisters*, they shall have *between them* two-thirds of what he shall leave; and if there be *several*, *both* brothers and sisters, a male shall have as much as the portion of two females. God declareth unto you *these precepts*, lest ye err; and God knoweth all things.

Inheritance of sisters (full or consanguine). Ss. 219, 220, 231, 232.

Sura V, Verses 5.

This day are ye allowed to eat such things as are good, and the food of those to whom the Scriptures were given is *also* allowed as lawful unto you; and your food is allowed as lawful unto them. And *ye are also allowed to marry* free women that are believers, and also free women of those who have received the Scriptures before you, when ye shall have assigned them their dower; living chastely *with them*, neither committing fornication nor taking *them for* concubines.

Intermarriage with Kitabias permited, s. 39.

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* Presumably the reference is to the passage which now stands at the commencement of this very chapter, but which must have been actually "revealed" at an earlier date.

† *i. e.* More remote than lineal descendants and ascendants.

Sura XXIV, Verses 2—9.

The punishment for fornication. See under s. 52

2. The whore, and the whoremonger, shall ye scourge with an hundred stripes. And let not compassion towards them prevent you from *executing* the judgment of God, if ye believe in God, and the last day; and let some of the true believers be witnesses of their punishment.

3. The whoremonger shall not marry *any other* than a harlot, or an idolatress. And a harlot shall no *man* take in marriage except a whoremonger, or an idolater. And this *kind of marriage* is forbidden the true believers.

4. But *as to* those who accuse women of reputation *of whoredom*, and produce not four witnesses *of the fact*, scourge them with fourscore stripes, and receive not their testimony for ever; for such are infamous prevaricators.

5. Excepting those who shall afterwards repent, and amend; for *unto such will* God *be* gracious and merciful.

Lían. See under s. 76.

6. They who shall accuse *their wives* of adultery, and shall have no witnesses *thereof* besides themselves; the testimony which shall be required of one of them *shall be*, that he swear four times by God that he speaketh the truth.

7. And the fifth *time that he imprecate* the curse of God on him, if he be a liar.

8. And it shall avert the punishment from *the wife*, if she swear four time by God that he is a liar.

9. And if the fifth *time she imprecate* the wrath of God on her if he speaketh the truth. [Then follows a reference to the well-known incident of the slandering of the Prophet's wife Ayesha; see Muir's Mahomet, p. 289.]

Sura XXX, Verses 38.

Maintenance of relatives. s. 149.

Give to him that is of kin to thee his reasonable due, and also to the poor and the stranger; this is better for those who seek the face of God and they shall prosper.

This text is given in the Tagore Lectures for 1891-92, by the Moulvi Mahomed Yusoof, as the supposed authority for the duty of maintaining relatives within the prohibited degrees.

Sura XXXIII, Verse 60.

Inheritance of Distant Kindred (*v*). s. 239.

Those who are related by consanguinity are nigher-of-kin the one of them unto the others, according to the Book of God, than the other true believers and the Mohajirun (Refugees).

This is cited by Mahomed Yusoof as an authority for the succession of Distant kindred. The context, however, shows that the main purpose of the revelation was to abrogate the former revelation (viii, 72) which disinherited the infidel relatives whom the Mohajirun had left behind at Mecca in favour of the Ansars (Helpers), who were thereby declared to be their kinsfolk by adoption, as it were; and that the question, what kind of consanguinity carries with it the right of inheritance, was not before the Prophet's mind at the time. Still, the use of the Arabic term *arham*, belonging to the womb, does, perhaps, afford some slight support to the view that maternal relations were not meant to be excluded. The last verse of the 8th Sura is to the same effect.

Verses 4, 5, and 37-40, which together establish and explain the non-recognition of adoptive relationship in Muhammadan Law, are fully set out under s. 80, *ante*.

XXXIII, 49.

O true believers, when ye marry *women who are* believers, and afterwards put them away before ye have touched them, *there is* no term prescribed you to fulfil towards them *after their divorce;* but make them a present, and dismiss them freely, with an honourable dismission.

Divorce before consummation, s. 78 (4).

Sura LVIII, 1—4, entitled "She who disputed."

1. Now hath God heard the speech of her who disputed with thee concerning her husband, and made her complaint unto God; * and God hath heard your mutual discourse, for God both heareth and seeth.

Divorce by Zihar, s. 75.

2. As to those among you who divorce their wives by declaring that they will thereafter regard them as their mothers, let them know that they are not their mothers. They only are their mothers who brought them forth; † and they certainly utter an unjustifiable saying, and a falsehood; but God is gracious and ready to forgive.

3. Those who divorce their wives by declaring that they will for the future regard them as their mothers, and afterwards would repair what they have said, shall be obliged to free a captive before they touch one another. This is what ye are warned to perform, and God is well apprised of that which ye do.

4. And whoso findeth not a captive to redeem, shall observe a fast of two consecutive months, before they touch one another. And whosoever shall not be able to fast that time, shall feed three-score poor men. This is ordained you, that ye may believe in God and His Apostle.

Sura LXV, Verses 1—7.

1. O Prophet, when ye divorce women, put them away at their appointed term; and compute the term *exactly*, and fear God, your Lord. Oblige them not to go out of their apartments, neither let them go out *until the term be expired*, unless they be guilty of manifest uncleanness. These *are* the statutes of God; and whosoever transgresseth the statutes of God, assuredly injureth his own soul. Thou knowest not whether God will bring something new to pass, *which may reconcile them*, after this.

The *iddat*, etc. Ss. 31, 59, 78, and 402.

2. And when they shall have fulfilled their term, either retain them with kindness, or part from them honourably; and take two witnesses from among you, men of integrity; and give *your* testimony as in the presence of God. This admonition is given unto him who believeth in God and the last day; and whoso feareth God, unto him will he grant a *happy* issue *out of all his afflictions*.

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* "This was Khawla bint Thalaba, the wife of Aws Ebn al Samat, who being divorced by her husband, by a form in use among the Arabs in the time of ignorance, *viz.*, by saying to her, 'Thou art to me as the back of my mother,' came to ask Mohammed's opinion whether they were necessarily obliged to a separation; and he told her that it was not lawful for her to cohabit with her husband any more; to which she replied that her husband had not put her away. The Prophet repeated his former decision, adding that such form of speaking was by general consent understood to imply a perpetual separation. On this the woman being greatly concerned because of the smallness (fewness ?) of her children, went home, and uttered her complaint to God in prayer; and thereupon this passage was revealed allowing a man to take his wife again, notwithstanding his having pronounced the above-mentioned form of divorce on doing certain acts of charity or mortification by way of penance." Sale, quoting Al Beidawi, Jellalooddeen, etc.

† "And therefore no woman ought to be placed in the same degree of prohibition, except those whom God has joined with them, as nursing mothers, and the wives of the Prophet." Sale, quoting Al Beidawi, and referring to K. iv, 23, and xxxiii, 4-6.

3. And he will bestow on him an ample provision from whence he expected *it* not; and whoso trusteth in God, he *will be* his sufficient support: for God will surely attain his purpose; and hath God appointed unto everything a determined period.

4. *As to* such of your wives as shall despair having their courses, *by reason of their age;* if ye be in doubt *thereof*, let their term *be* three months; and *let the same be the term* of those who have not yet had their courses. But *as to* those who are pregnant, their term shall be, until they be delivered of their burden. And whoso feareth God, unto him will he make his command easy.

5. This is the command of God, which he hath sent down unto you. And whoso feareth God, he will expiate his evil deeds from him, and will increase his reward.

Maintenance of divorced wives during their *iddat*. S. 78 (5), 401.

6. Suffer the women *whom ye divorce* to dwell in *some part* of *the houses* wherein ye dwell; *according to the room and conveniences* of the *habitations* which ye possess; and make them not uneasy, that ye may reduce them to straits.

Provision for pregnancy and wet-nursing.

And if they be with child, expend on them *what shall be needful* until they be delivered of their burden. And if they suckle their children for you, give them their hire; and consult among yourselves, according to what shall be just and reasonable. And if ye be put to a difficulty *herein*, another *woman* shall suckle *the child* for him.

7. Let him who hath plenty expend *proportionably, in the maintenance of the mother and the nurse*, out of his plenty, and let him whose income is scanty expend *in proportion* out of that which God hath given him. God obligeth no man to more than he hath given him *ability to perform;* God will cause ease to succeed to hardship.

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* *Maulawi* is a lengthened form of *Maula*, or *maulíy*, which may denote either patron or freedman, lord or vassal ; and in a more general sense, either superior or inferior. Here it is probably to be taken in the more dignified sense, either as a vague honorific appellation, or possibly as recalling the historic associations of legal advice and advocacy with the relation of patron and client.

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* So spelt by Muir, in the passage quoted; but the *dh* represents the same letter as the *z* in *zimmí*

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* Same word as *matat* (*q.v.*), though spelt differently in most books. Its proper meaning "profit" or "enjoyment ;" and it denotes in the one case the compensation received by the bride-elect whose marriage is broken off, and in the other, either the wages received by the woman or the enjoyment secured by the man under a temporary arrangement.

† *Mootât* in Baillie ; and see under *Mutâ*.

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* So in Baillie, transliterating according to the Arabic rather than the Indian pronunciation.

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* They do not appear in the Table of Sects and Schools (p. 91), inasmuch as their peculiarities have not, as far as I know, any bearing on the topics of Anglo-Muhammadan Law.

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THE END.

KINNEY.—Law Relating to Official Trustees, etc. Rs. 4. [1915.

—— **Law of Infants and Guardians.** Rs. 4. [1916.

—— **The Succession Certificate Act.** Rs. 2. [1910.

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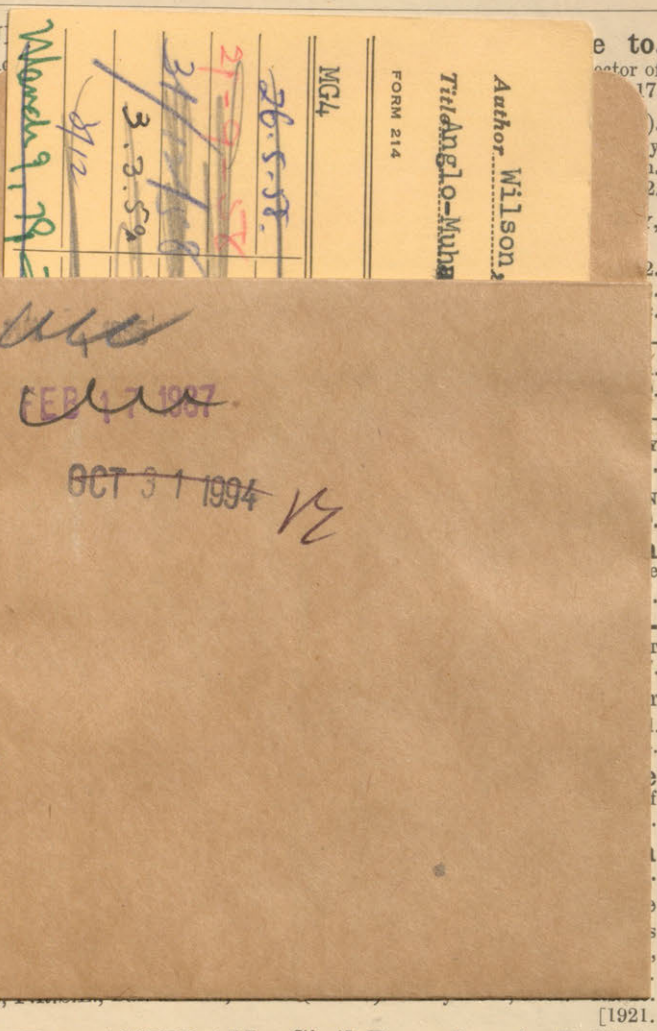
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